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Case No. _____

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1983

THOMAS JAMES SINITO,

*Petitioner,*

—v.—

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BERNARD A. BERKMAN
J. MICHAEL MURRAY
BERKMAN, GORDON, MURRAY AND PALDA
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 781-5245

*Attorneys for Petitioner*

*Of Counsel:*

RICHARD T. BUSH

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## QUESTIONS PRESENTED FOR REVIEW

1. Does the double jeopardy clause of the Fifth Amendment protect a defendant who has once been tried and convicted of RICO conspiracy from being prosecuted a second time for RICO conspiracy where, at a pre-trial hearing challenging his second prosecution, the defendant produces extensive and uncontradicted evidence, including direct testimonial and documentary admissions by the Government's own investigating F.B.I. agents, that both prosecutions are in fact based upon one and the same conspiracy?

2. Are the offenses of Continuing Criminal Enterprise, 21 U.S.C. §848, and RICO Conspiracy, 18 U.S.C. §1962(d), in relation to each other greater and lesser offenses, and therefore the same for Double Jeopardy purposes, so that a prior conviction of RICO Conspiracy bars a subsequent prosecution for Continuing Criminal Enter-

prise arising out of the same criminal agreement?

## PARTIES

There are no parties other than those listed in the caption of this case before this Court.

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THOMAS JAMES SINITO

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UNITED STATES OF AMERICA

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---

# PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit. That judgment affirmed the judgment and order of the United States District Court for the Northern Ditrict of Ohio, Eastern Division, overruling petitioner's motion to dismiss Counts One and Two of the present indictment pursuant to the Double Jeopardy Clause of the Fifth Amendment.

## OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit appears at 723 F.2d 1250 and is set forth in the Appendix, infra, at A-2 - A-51. The unreported order of the Court of Appeals denying petitioner's motion for rehearing is set forth in the Appendix, infra, at A-1. The unreported opinion and order of the United States District Court for the Northern District of Ohio, Eastern Division are set forth in the appendix at A-52 - A-64 and A-65, respectively.

## JURISDICTION

The opinion and judgment of the United States Court of Appeals for the Sixth Circuit was filed on December 23, 1983. The Court of Appeals denied the petitioner's motion for rehearing on February 8, 1984. This petition seeks review of the judgment of a United States Court of Appeals in a criminal case. This Court has jurisdiction

to grant the requested petition under 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> No person shall ... be subject for the same offence to be twice put in jeopardy of life or limb.

The following statutory provisions are set forth in the Appendix:


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## STATEMENT OF THE CASE

This petition seeks review of the judgment entered by the United States Court of Appeals for the Sixth Circuit which affirmed the order of the United States District Court for the Northern District of Ohio denying petitioner's pretrial motion to dismiss counts One (1) and Two (2) of a

seventy (70) count indictment. The exhaustive record in this case boldly illustrates the gravity of the lower courts' error.[1]

I. The Indictments in This Case

The indictment in the present case, filed on October 27, 1982, names seven defendants: Carmen P. Zagaria, Joseph Gallo, Frederick Graewe, Harmut Graewe, Angelo A. Lonardo, Kevin McTaggert and petitioner Thomas J. Sinito; and charges a total of 70 counts, with petitioner Sinito named

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[1] The pertinent indictments, as well as other documentary and testimonial evidence too voluminous for inclusion in the Appendix herein are part of the Court of Appeals record which is being separately transmitted to this Court. This appellate record consists of a transcript of the evidentiary hearing conducted by the District Court (cited herein as "Tr. ____") and the two-volume Joint Appendix of the parties (cited herein as "JA-____"). Exhibits in the Joint Appendix are designated by the same letters assigned in the District Court.

in all 70.[2] Only Counts One and Two are at issue here.

Count One charged that the above defendants, with the exception of Lonardo, conspired to participate in an enterprise consisting of "a group of individuals associated in fact" to control drug trafficking and illegal gambling in Cleveland, Ohio through a pattern of racketeering activities. Count One went on to charge that this group of persons was known as the "murder, gambling, and drug distribution network controlled by 'the Cleveland Organized Crime Family,' which Organized Crime Family was also known as 'the Outfit,' or as 'the Organization,' or simply as 'the Mafia.'"

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[2] This indictment superseded an earlier indictment which had been returned on July 6, 1982. The most significant difference between the two indictments was the transformation of Carmen Zagaria from a named defendant in the original indictment to an unindicted co-conspirator in the superseding indictment, resulting from a plea bargain between the government and Zagaria. Counts 71 through 74 of the original indictment were deleted because only Zagaria had been named in those counts.

This conspiracy, it was charged, began in March of 1978 and continued up to and including the date of the indictment, July 6, 1982. It involved not only the defendants, the indictment charged, but over 70 unindicted co-conspirators who were directed and supervised by the defendants. This massive criminal organization, it was alleged, conspired to engage in and monopolize illegal drug trafficking and illegal gambling in the Cleveland area, and to protect these rackets from internal and external threats by the commission of numerous aggravated murders, by the use of fear, intimidation and violence and by obstructing justice, all in violation of the RICO conspiracy statute, 18 U.S.C. Section 1962(d).

Count Two of the indictment charged the same defendants named in Count One, along with co-defendant Angelo A. Lonardo, with a Continuing Criminal Enterprise conspiracy, in violation of 21 U.S.C. Section 848. The conspiracy charged in Count Two covered the

identical time period charged in Count One, from March of 1978 up to and including July 6, 1982, the date of the indictment. As in Count One, Count Two charged that the defendants, members of the "Cleveland Organized Crime Family," supervised over 70 unindicted co-conspirators in conspiring to monopolize a multi-million dollar drug trafficking ring in the Cleveland area; that in order to perpetuate this conspiracy, the defendants conspired to protect their illegal business from internal and external threats by the commission of numerous murders, by the use of fear, intimidation, force and violence and by bribing state and local police officers.

Thus, the First and Second Counts of the indictment charged petitioner with participation in a massive organized crime conspiracy known as "the Cleveland Organized Crime family," which was involved in the repeated commission of nearly every offense normally attributed to organized crime--

drugs, gambling, murder, intimidation of witnesses, extortion, bribery and obstruction of justice.

Conspicuous in its absence from the laundry list of crimes encompassed within the huge conspiracy charged in the indictment, however, was the offense of loansharking. That loansharking would not be charged in the indictment as within the scope of the conspiracy is surprising in view of the fact that the F.B.I. investigation which led to the indictment in this case proceeded on the theory that the conspiracy included not only drug trafficking and illegal gambling but loansharking as well. (See pp. 19-20, infra).

The answer to the question of why loansharking was not included within the scope of the conspiracy charged in the present indictment appears to lie in the earlier indictment returned against petitioner Sinito on which he stood trial and was con-

victed and on which he based the double jeopardy plea which is at issue here.

II. The Prior Conviction

Less than nine months prior to the filing of the original indictment in the present case, petitioner was tried, convicted and sentenced on an indictment charging nineteen counts including a RICO conspiracy, a RICO substantive violation, eleven counts of loansharking and five counts of tax offenses.

Petitioner was tried and convicted of the RICO conspiracy count and several of the substantive counts. He was sentenced to imprisonment for 10 years and to a fine of $10,000.00 for his conviction on the RICO conspiracy count. Additional sentences were imposed for his conviction on other counts so that the total sentence imposed upon appellant for his conviction in Case No. CR81-58 was 18 years imprisonment and a $20,000.00 fine.

Pertinent to the present petition is count one of that indictment, the RICO conspiracy count. Count one charged that petitioner Sinito, his co-defendant and cousin Charles Sinito and their unindicted co-conspirator David M. Perrier conspired with each other and "diverse other persons" to participate in the affairs of an enterprise, the Appliance Mart retail store, through a pattern of racketeering activity, to wit: loan sharking.

The RICO loansharking conspiracy began, according to the indictment, in March of 1974 and continued up to and including January 30, 1979. Thus, even on the face of the indictments there was a substantial overlap in time between that conspiracy and the one charged in the instant case, alleged to have begun in March of 1978.

Similarly, there was a substantial overlap between the personnel closely connected with the conspiracy charged in Case No. CR81-58 and the personnel involved in

the conspiracy charged in the present case. For example, David Perrier, named in the loansharking indictment as an unindicted co-conspirator has also been identified by the government as an unindicted co-conspirator in the present case (See Govt.'s Notice of Intention to Use Evidence of Co-Conspirators and Other Declarations, filed October 28, 1982 in the district court). Angelo Lonardo, a defendant in the present case, was shown at the trial of the loansharking case to be a member of the conspiracy charged in that case (Tr. 26-29, 33-37). And during the loansharking trial, references were made to Carmen Zagaria, identified as a principal conspirator in the present case, and to Joseph Giamo, identified by the government as an unindicted co-conspirator in the present case (Tr. 28, 44).

III. The Evidentiary Hearing

On September 23, 1983 defendant Sinito filed a motion to dismiss Counts One and Two

of the present indictment on the ground that the conspiratorial agreements charged in those counts was part of the same conspiracy for which he had previously been tried, convicted and sentenced to prison less than nine months earlier. Petitioner asserted that the Double Jeopardy Clause of the Fifth Amendment proscribed the artificial subdivision of a single conspiracy in order to allow separate prosecutions and punishments for the same offense.

At the evidentiary hearing on petitioner's motion, which was held on October 19, 1982, petitioner produced extensive and uncontradicted testimony, including direct documentary and testimonial admissions by Special Agents of the F.B.I., each of whom had been involved in investigating Sinito, that the two conspiracies were in fact one and the same. At the hearing, the defense offered numerous exhibits into evidence, including the indictment in Case No. CR81-58, the loansharking case, as well as a copy

of the trial transcript in that case (Def. Exs. A and C). The defense proceeded to cross-examine the three Special Agents of the F.B.I. who had been involved in investigating petitioner Sinito.[3]

The first witness was Special Agent Herbert E. Cohrs, the case agent in the loansharking conspiracy case (Tr. 11-12). Agent Cohrs admitted that several of the persons identified as conspirators in the

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[3] At the hearing, the government went forward first. It offered an affidavit to show that the indictment in the present case and the indictment in the loansharking case had been returned by different grand juries (Govt. Ex. 1). It then called two of the three F.B.I. agents who appeared at the hearing for a short direct examination, the purpose of which was unclear as essentially all that was elicited from the agents by the government was their familiarity with petitioner and the fact that one was the case agent in the loansharking case and the other was the case agent in the present case (Tr. 10-15; Tr. 52-54). Finally, the government offered for in camera inspection by the court the grand jury transcripts pertaining to the present case, the loansharking case and pertaining to a 1978 indictment that had been returned against the petitioner and was offered into evidence by the defense as Def. Ex. B. The trial court had, on October 18, 1982, overruled petitioner's motion for inspection of these grand jury transcripts.

present case, including Carmen Zagaria (Tr. 29-30), Joseph Giamo (Tr. 44), and defendant Angelo Lonardo (Tr. 26-29, 33-37), were involved in or closely connected with the loansharking conspiracy prosecuted in the first trial. In fact, agent Cohrs admitted that the F.B.I. had information as early as 1975 that Lonardo was Sinito's financial backer in the loansharking operation (Tr. 31-38; Def. Exs. F and G). (See also Tr. 41-43; Def. Exs. H and I.)

Moreover, Cohrs admitted that the government had obtained information in 1975 and again in 1977 that petitioner was involved not only in loansharking but in narcotics as well (Tr. 36, 39; Def. Exs. F and G).

Finally, Special Agent Cohrs admitted that investigation by himself and other F.B.I. Agents had revealed that there was a massive criminal conspiracy in the Cleveland area known as the Outfit or the Mafia; that Sinito and his co-defendants in the present

case, Angelo Lonardo and Joseph Gallo, were members of that conspiracy; and that Sinito and Lonardo were involved in loansharking for that criminal organization (Tr. 21-26). He also acknowledged that at appellant's loansharking trial, a number of references to petitioner's connections with organized crime were made before the jury (Tr. 44, 45).

Special Agent Dean Winslow, the case agent in the present case (Tr. 53), testified next. He opened his investigation in March of 1980 (Tr. 53). From the very beginning, it was an investigation of petitioner and alleged co-conspirators Carmen Zagaria and Joseph Gallo under the RICO statute and included, under that law, investigation of narcotics trafficking and loansharking as well as other violations (Tr. 71-72, 77-78; Def. Ex. L).

He knew as early as 1978, when he was assigned to the Cleveland office of the F.B.I., that petitioner had been involved in

loansharking activities (Tr. 58). And by December of 1980, more than five months before the loansharking indictment was returned against petitioner Agent Winslow's investigation had revealed that the funds to finance the narcotics business in which the targets of his investigation were allegedly involved were provided by petitioner's loansharking activities; that petitioner Sinito and co-conspirator Gallo were assisting co-conspirator Lonardo in running the criminal organization's street operations; and that the conspirators were involved not only in drug trafficking but in loansharking and gambling as well (Tr. 60-62; Def. Ex. K).

In what can only be characterized as startling admissions, Special Agent Winslow directly conceded that his investigation had shown that there was a single massive criminal conspiracy by a single organization to control various illegal rackets in the Cleveland area, including drugs, gambling and loansharking; that this single conspir-

acy proceeded under a well-defined organizational structure known as La Cosa Nostra or the Mafia; that one James Licavoli and named defendant Angelo Lonardo were at the top of this organization; that Sinito and named defendant Joseph Gallo occupied positions at the second level of this organization; that loansharking was part of this single criminal conspiracy; that Sinito and defendant Lonardo were actively involved in the loansharking aspect of the conspiracy; that the organization constituting this single conspiracy to control the illegal drug, gambling and loansharking rackets in the Cleveland area perpetrated other crimes as part of this conspiracy, including murder, bribery and obstruction of justice in order to protect its foothold on the drug, gambling and loansharking rackets; and that in 1978 named conspirator Carmen Zagaria joined this continuing criminal conspiracy (Tr. 63-64, 68, 70-71, 74-76).

Moreover, Special Agent Winslow conceded that, throughout his investigation, he operated on the theory that this conspiracy came within the prohibitions of the RICO law (Tr. 76-77). He used the code name "Busmark" for his investigation of this conspiracy (Tr. 69-70) on internal F.B.I. reports pertaining to his investigation, along with a descriptive legend which revealed clearly what he acknowledged to be the government's position that drug trafficking, gambling and loansharking were all within the scope of the single massive conspiracy being investigated under the RICO law (Tr. 69-70, 78-80). Specifically, the following descriptive legend appeared on internal F.B.I. documents pertaining to his investigation: "Re: Busmark; RICO--Arson, Gambling, Loansharking, Murder, Narcotics" (Tr. 78-80; Def. Exs. M and N).

The final witness to appear at the hearing was Special F.B.I. Agent George Grotz, called by the defense for cross-

examination. Agent Grotz had been assigned to the F.B.I.'s Cleveland office in October of 1972 where he remained until July of 1981 (Tr. 87-88). During the last two years of his tenure, he served as the Supervisory Special Agent of the Organized Crime Squad (Tr. 88).

He, too, admitted that investigations conducted by him and other F.B.I. agents had revealed that there was a massive criminal conspiracy from as early as 1972 by a single organization known as the Mafia to control various rackets in the city of Cleveland, including gambling, drug trafficking and loansharking (Tr. 89-92). He testified that, among others, appellant Sinito and named defendants Lonardo and Gallo were members of that conspiracy (Tr. 90-91).

Agent Grotz identified Defendant's Exhibit B, an indictment that had been returned against a number of persons on January 6, 1978, including petitioner Sinito and Angelo Lonardo, charging them with a

RICO conspiracy under 18 U.S.C. Section 1962(d) (Tr. 94-95; Def. Ex. B). That indictment charged the very theory that the government tries to disclaim in the present case, i.e., that at least as early as May, 1975, the defendants there were associated with an enterprise composed of "a group of individuals associated in fact to commit, carry on and supervise loan-sharking, gambling, murder and other criminal activities in the Northern District of Ohio...." (Emphasis added)(Tr. 94-95; Def. Ex. B).

Finally, Agent Grotz testified that his investigation had, indeed, shown that petitioner Sinito's loansharking activities were undertaken as a part of the massive criminal conspiracy by that single organization to control the gambling, loansharking and drug rackets in the Cleveland area (Tr. 91-96).

Following the hearing at which the foregoing record was made, the district court overruled appellant's motion to dismiss Counts One and Two of the indictment.

In its opinion, the district court did not recount any of the evidence which had been adduced at the evidentiary hearing. Nor did the district court even mention the question of who had the burden of proof. Rather, in reaching its conclusion that the two indictments charged separate conspiracies, the district court appeared to rely exclusively upon the differences between the two charges revealed by a mere comparison of the indictments on their faces, with no discussion of whether the underlying events on which each of the two indictments was based were, in reality, all part of a single conspiracy (See Memorandum of Opinion of the district court issued October 29, 1982, App. at A-52). The district court did find, however, that an appeal would not lack any "colorable foundation," See United States v. Lanci,[4] 669 F.2d 391, 394 (6th Cir. 1981), thus

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[4] In Lanci, the Sixth Circuit held that where an appeal pursuant to Abney lacks such colorable foundation, the district court has jurisdiction to proceed to trial despite the pendency of the appeal.

permitting a pretrial appeal by petitioner under Abney v. United States, 431 U.S. 651 (1977).

The Court of Appeals affirmed in an opinion which once again applied a test which stressed the differences between the allegations of the two indictments while disregarding the uncontradicted evidence showing that a single conspiracy existed. Because the test applied by the lower courts is inconsistent with this Court's decision in Braverman v. United States, 317 U.S. 49 (1942), and with the tests for unity of conspiracy applied in other circuits, e.g., Short v. United States, 91 F.2d 614 (4th Cir. 1937), and because the present case raises important issues affecting a fundamental constitutional right, petitioner brings this petition for certiorari.

## REASONS FOR GRANTING THE WRIT

### I. THIS CASE PRESENTS IMPORTANT QUESTIONS RECURRING WITH INCREASING FREQUENCY, UPON WHICH THE FEDERAL COURTS OF APPEALS ARE IN CONFLICT AND UPON WHICH THIS COURT HAS NOT SPOKEN, CONCERNING ENFORCEMENT OF THE DOUBLE JEOPARDY CLAUSE OF THE FIFTH AMENDMENT IN THE CONTEXT OF SUCCESSIVE PROSECUTIONS BROUGHT UNDER THE EVER EXPANDING REACH OF FEDERAL CONSPIRACY LAWS.

"The right not to be placed in jeopardy more than once for the same offense is a vital safeguard in our society, one that was dearly won and one that should continue to be highly valued." Green v. United States, 355 U.S. 184, 198 (1957). The present case presents the profoundly important issue of whether this vital safeguard may be abrogated in conspiracy cases by mere forms of pleading.

Seven years ago this Court ruled that because the Double Jeopardy Clause protects defendants not only from being convicted and punished twice for the same offense but also from being tried twice for the same offense, a plea of former jeopardy must be resolved

prior to trial and that the accused is entitled to pretrial appellate review of any order rejecting his double jeopardy plea. Abney v. United States, 431 U.S. 651 (1977). At or about the same time that Abney was being decided, a flood of cases was reaching the federal appellate courts arising under the battery of criminal prohibitions created by Congress in 1970, including the two conspiracy provisions at issue in the present case: RICO Conspiracy, 18 U.S.C. §1962(d), and Continuing Criminal Enterprise, 21 U.S.C. §848. The unprecedented scope of these overlapping criminal provisions has created difficult and important issues regarding the protection afforded by the Double Jeopardy Clause to conspiracy defendants faced with multiple charges in successive prosecutions and the rules for enforcing those constitutional protections. Since Abney, literally scores of cases have reached the federal courts requiring exposition of such rules. The lower courts have

reached confusing and contradictory results in such cases. The present case clearly illustrates that time has come for guidance from this court.

A. An Important Question is Presented as to Whether the Various Tests Being Applied by the Lower Courts to Resolve Claims of Double Jeopardy Are Adequate to Protect an Accused Who Has Once Been Tried on a Federal Conspiracy Charge From Being Prosecuted Again For the Very Same Criminal Agreement.

The threshold inquiry in any case involving a claim of double jeopardy is whether the offense presenty charged and the offense with respect to which the accused was formerly placed in jeopardy are the "...'same offense,' a phrase deceptively simple in appearance but virtually kaleidoscopic in application." Whalen v. United States, 445 U.S. 684, 700 (1980) (Renquist, J., dissenting). When the charges at issue are substantive offenses, the inquiry has been guided by the standard "same evidence" test, which focuses on whether "...the evidence required to support a conviction in

one of the prosecutions is sufficient to support conviction in the other prosecution." United States v. Tercero, 580 F.2d 312, 314 (8th Cir. 1980); See Blockburger v. United States, 284 U.S. 299, 304 (1932).

Where, however, the charges at issue are of a continuing nature, as is a conspiracy charge, the matter cannot be resolved by simple comparison of the indictments and application of the "same evidence" test. E.g., United States v. Tercero, supra; United States v. Jabara, 644 F.2d 574 (6th Cir. 1981); United States v. Ruigomez, 576 F.2d 1149 (5th Cir. 1978); United States v. Papa, 533 F.2d 815 (2nd Cir. 1976). This is because the essence of the crime of conspiracy is the agreement, which may and often does contemplate a continuous and diverse scheme manifesting itself in a variety of overt acts and illegal conduct. See Braverman v. United States, 317 U.S. 49 (1942). Yet, as Braverman makes clear, the proscribed offense in a conspiracy charge is

the agreement, regardless of the number of illegal objects it encompasses.

Because the essence of the crime of conspiracy is the agreement itself, it has been uniformly held that no matter how massive or diverse a single conspiracy may be, the government may not subdivide it in order to impose multiple prosecutions and punishments. Braverman v. United States, supra; United States v. Jabara, supra; United States v. Tercero, supra; United States v. Ruigomez, supra; United States v. Young, 503 F.2d 1072, 1075 (3rd Cir. 1974); United States v. Palermo, 410 F.2d 468, 470 (7th Cir. 1969); Short v. United States, 91 F.2d 614, 620-621 (4th Cir. 1937); United States v. McGee, 117 F. Supp. 27, 31-32 (D. Wyoming).

With this principle in mind the courts have repeatedly recognized that the same evidence test simply will not protect an accused from being twice placed in jeopardy for the same conspiracy because it allows

prosecutors to frame indictments to allege different time frames, illegal objects and overt acts, so that the evidence required to support a conviction under one indictment would not be sufficient to support a conviction under another. E.g., United States v. Jabara, supra; United States v. Tercero, supra; United States v. Ruigomez, supra; contra, United States v. Martinez, 562 F.2d 633, 637 (10th Cir. 1977) (continuing to apply same evidence test to conspiracy indictments). See also, United States v. Kamins, 479 F. Supp. 1374, 1377-82 (W.D. Pa. 1979) (discussing various approaches to double jeopardy-conspiracy issues). Thus, by artificially subdividing a single conspiracy by varying allegations in the indictments, virtually infinite bases for liability could be manufactured and the defendant could be forced to suffer a host of consecutive prosecutions.

Responding to these concerns, the courts have attempted to forge new standards

for resolving double jeopardy claims in conspiracy cases. The common trend is to adopt the phraseology that such double jeopardy claims are to be resolved by considering "whether the totality of the circumstances demonstrate that the two alleged conspiracies are in reality part of a single conspiracy." United States v. Tercero, supra, 580 F.2d at 315 (footnote omitted). See also, e.g., United States v. Jabara, supra; United States v. Guido, 597 F.2d 194 (9th Cir. 1979); United States v. Mallah, 503 F.2d 971 (2nd Cir. 1974), cert. denied 420 U.S. 995 (1975).

The "totality of the circumstances" test has, however, proven to be as kaleidoscopic in application as the "same evidence" test, and has created as much conflict and confusion as clarity. More importantly, there has been a shift of emphasis in the application and refinement of the test which has crept into recent cases, including this one, which is frustrating rather than fur-

thering its original mission of enforcing the Double Jeopardy Clause in the ever expanding area of federal criminal conspiracy law.

The courts below held that the issue of whether two conspiracies arise from a single agreement is to be determined by the application of a five-prong test considering the following factors:

> "1) time; 2) persons acting as co-conspirators; 3) the statutory offenses charged in the indictments; 4) the overt acts charged by the government or any other description of the offenses charged which indicates the nature and the scope of the activity which the government sought to punish in each case; and 5) places where the events alleged as part of the conspiracy took place. Where several of these factors differ between the conspiracies, the conclusion follows that the alleged illegal conspiracies are separate and distinct offenses.

723 F.2d at 1256-57; App. at A-20-21. (Citations omitted; emphasis added).

Paradoxically, while the purpose of the "totality of the circumstances" approach was to prevent the government from framing an indictment in order to subdivide a conspir-

acy, the very formulation of the "five factor" test places dominant emphasis upon the language of the indictment, with three of the five factors explicitly governed by the face of the indictments. This defect is further aggravated where, as in the present case, analysis of all five factors focuses on the indictments as opposed to the underlying circumstances shown by the evidence before the court.

An analysis of the opinions below demonstrates that by their application of the five factor test the courts below erroneously allowed the government artificially to subdivide a single conspiracy merely by the framing of the indictments.

First, both of the lower courts noted that the RICO loansharking conspiracy was alleged in the indictment to have taken place from March 1, 1974 to January 30, 1979, while the present RICO conspiracy indictment is alleged to have occurred between March 6, 1978 and October 28,

1982. The Court of Appeals dismissed the overlap, stating that "An overlap of ten months is not indicative of one conspiracy." 723 F.2d at 1257, App. at A-22. However, both the Court of Appeals and the District Court completely disregarded the fact that the uncontradicted testimony of the government's agents indicated that the single massive conspiracy charged here, involving loansharking, drugs, gambling and other crimes, extended as far back as 1972 (Tr. 96-97). See also Tr. 36-39 and Def. Ex. B, the 1978 indictment charging petitioner's involvement in a conspiracy involving loansharking, gambling, murder and other crimes beginning on or about May, 1976. Petitioner submits that such uncontradicted evidence could be disregarded only by erroneously considering the allegations of the present indictment to be controlling.

The appellate court's error in regarding the allegations of the indictment as paramount is also illustrated in its discus-

sion of the personnel involved in the conspiracy. For example, uncontradicted evidence showed that Angelo Lonardo was involved with petitioner Sinito in a massive conspiracy involving a variety of crimes, that Lonardo supplied Sinito with his loan-sharking funds and that Lonardo was in fact Sinito's superior in a single organized criminal enterprise. E.g., Tr. 22-23, 70, 89-90, 95-96. The court stated, however, that "This overlap in the two indictments appears tenuous at best, since Lonardo was neither charged in count one of the present indictment as a named defendant or unindicted co-conspirator, nor was he named as a co-defendant in the loansharking trial."[5] 723 F.2d at 1257, App. at A-24.

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[5] Lonardo is, however, named as a defendant in Count Two of the present indictment. It is, of course, incredible that Lonardo would be involved with the six other named defendants in the massive criminal enterprise involving narcotics charged in Count Two and yet not be involved in the massive criminal enterprise charged in Count One involving narcotics and other crimes and naming those same six defendants.

Similarly, the uncontradicted evidence shows Carmen Zagaria's involvement with both alleged conspiracies. In fact, Zagaria, who was originally indicted in the present case, is still named as an unindicted conspirator. However, the court disregarded his involvement because he was no longer a defendant but, instead, would testify as a government witness pursuant to a plea bargain. Id. at 1257; App. at A-24-25.

Further, David Perrier, named in the loansharking indictment indictment as an unindicted co-conspirator, has also been identified as an unindicted co-conspirator in the present case (See, e.g., Govt.'s Notice of Intention to Use Evidence of Co-Conspirators and Other Declarations, J-A-226, 227). While defendant is alleged to have killed Perrier, the fact remains that his conceded membership in both conspiracies serves to indicate that they were, in fact, the same.

Moreover, apart from these three individuals discussed in the Sixth Circuit opinion, the evidence presented at the pretrial hearing and in the documents submitted to the courts below establishes the existence of a single massive conspiracy involving a host of other participants. In such a context, rigid adherence to a rule comparing the defendants named in the successive prosecutions only serves to obscure the ultimate issue of whether the government has artificially carved up a single conspiracy in violation of the Double Jeopardy Clause.

In discussing the third factor, "the statutory offenses charged in the indictments," Id. at 1256; App. at A-21, the Court of Appeals acknowledged that both indictments alleged a RICO conspiracy. However, the court then went on to distinguish between the underlying enterprises and substantive offenses alleged in the two indictments as a basis for finding separate

conspiracies. This approach is, however, wholly inconsistent with Braverman's lesson that it is the agreement which is the essence of the conpiracy charge regardless of the number or variety of its objects.

The fourth prong applied below, examining "the overt acts charged by the government or any other description of the offenses charged which indicates the nature and scope of the activity which the government sought to punish in each case," 723 F.2d at 1256; App. at A-21, is an equally ineffective gauge of whether the government has carved up a conspiracy in order to inflict multiple prosecutions and punishments. The Court of Appeals apparently realized that analysis of overt acts charged provides no protection at all for the right against double jeopardy, so it went on to inquire into what it perceived to be the activity which the government sought to punish in the previous prosecution. The court stated that "Prosecution of the acts

charged in the present indictment indicates a clear and permissable intent to punish activity divorced from loansharking which was the sole scope of the first indictment." 723 F.2d at 1258; App. at A-30. Petitioner is not contending, however, that the Double Jeopardy Clause bars the prosecution of the illegal acts which he is alleged to have committed. The point which is obscured by the court's analysis is that it is the conspiracy which the government seeks to make the subject of a second prosecution.

The Court of Appeals' treatment of the final prong of its analysis, "the places where the events alleged as part of the conspiracy took place," Id. at 1256, is equally problematic. The court stated that:

> Each indictment charged that events occurred in the Northern District of Ohio, Eastern Division and elsewhere. Standing alone this fact is of minimum significance. As the district court noted 'it is unquestioned, however, that such an allegation was contained in each indictment for venue purposes.

Id. at 1258-59; App. at A-31. This says nothing more than that the alleged crime is

being tried at the place at which it occurred. But, even assuming that the court's tautological analysis could withstand scrutiny, there must be some explanation why the court felt constrained to limit its inquiry to the allegations in the indictment when the evidentiary record conclusively identified the Cleveland, Ohio area as the situs of the massive conspiracy which controlled not only loansharking, but also gambling, narcotics, and other crimes. Tr. at 23, 27, 50-51, 68, 73-75, 89, 92, 96.

In short, at every point in its analysis the Court of Appeals was led to disregard the uncontradicted facts and to instead focus upon the face of the indictment. More importantly, the fact that all three of the testifying government agents, who had spent years of their professional careers investigating the facts, testified unequivocally that a single conspiracy existed, simply had no niche in the rigid "factor" analysis. This is not suprising

given the inherent infirmity of the "five-factor" test itself.

This infirmity can be further clarified by an analysis of the origin of the "five-factor" test itself. The Court of Appeals below cited United States v. Jabara, supra, as Sixth Circuit authority rejecting the "same evidence" test and applying the "totality of the circumstances" test. Id. at 1256; App. at A-19. Jabara, supra, 644 F.2d at 577, in turn relied upon United States v. Tercero, supra, as authority. Neither Jabara nor Tercero, however, employed the "five factor" analysis adopted below. To the contrary, both Jabara and Tercero cautioned against reliance upon allegations of overt acts and both upheld defendant's claims of arbitrary conspiracy splitting.

As authority for the adoption of the "five factor" test, the court below cited United States v. Stricklin, 591 F.2d 1112 (5th Cir.), cert. denied, 444 U.S. 963

(1979), and its precursor, United States v. Marable, 578 F.2d 151, 154 (5th Cir. 1978). Marable, in turn cited (with "Cf.") Arnold v. United States, 336 F.2d 347 (9th Cir. 1964), cert. denied, 380 U.S. 982 (1965), and Short v. United States, 91 F.2d 614 (4th Cir. 1937).

In Short, however, the "five factors" appeared in the course of the government's argument that because the allegations in the indictment differed on each of the factors, the trial court's dismissal of defendant's double jeopardy claim was correct as a matter of law. 91 F.2d at 619-20. The Fourth Circuit, however, explicitly rejected such an analysis, stating:

> We agree that these differences make it impossible to say as a matter of law upon the face of the indictments that they relate to the same conspiracy; but we think that because of the generality of the language used it is likewise impossible to say upon the face of the indictments that they do not relate to the same conspiracy.

Id. at 620.

The citation to Arnold is equally illustrative of the defects inherent in the five factor test, for the court in that case referred to the five factors in the course of applying the same evidence test which has been so soundly discredited as a device for preventing multiple prosecutions in conspiracy cases.[6] 336 F.2d at 348-349. Since the "five factor" test focuses upon the allegations contained in the indictment, it is, of course, no more of a safeguard against prosecutorial abuse than the "same evidence" test, and is in fact merely a useless reformulation of that test.

Even Marable itself did not view the five factors as the sine qua non of a single

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[6] Further, in Arnold, the defendant contended that the government had refrained from offering proof of events occurring during the 17 month overlap between the two indictments at issue there because it feared a possible defense of double jeopardy. The Arnold court treated the contention as a mere issue of variance and held that the disparity was not prejudicial. Accordingly, since the same evidence was not used to prove both conspiracies, the double jeopardy contention was dismissed.

conspiracy. In that case, the indictments themselves were sufficient to show a single conspiracy and it was therefore unnecessary to go behind them.

While many decisions have continued to apply the "totality of the circumstances" test in a properly flexible manner, without application of the strict "five factor" test, e.g., United States v. Jabara, supra; United States v. Tercero, supra; United States v. Mallah, 503 F.2d 971 (2d Cir. 1974), other courts have placed dangerously increasing reliance upon the application of the "five factors." E.g., United States v. Flick, 716 F.2d 735 (1983); United States v. Sturman, 679 F.2d 840 (11th Cir. 1982); United States v. Stricklin, supra, 591 F.2d at 1112.

The Court of Appeals' approach to defining the scope of a conspiracy for double jeopardy purposes is also inconsistent with the many holdings giving a broad definition to conspiracies for the purpose

of imposing liability. See United States v. Mallah, 503 F.2d 971, 984-985 (2nd Cir. 1974). This is particularly true in the context of a RICO conspiracy prosecution, since the very purpose of the RICO statute was to facilitate prosecution in one proceeding of conspiracies involving a variety of illegal activities. United States v. Elliot, 571 F.2d 880, 902 (5th Cir. 1978). See also United States v. Riccobene, 709 F.2d 214 (3d Cir. 1983), cert. denied U.S. ___, 104 S.Ct. 157 (1983). In the present case the govenment seeks to prosecute gambling, drug trafficking, murder, and a host of other crimes under a single umbrella, but asserts that loansharking must be left out in the rain. The government simply cannot have it both ways. The decisions below represent a striking example of the danger engendered by an approach which allows the government to craft its allegations to carve up a single conspiracy into many. This danger is compounded by the

proliferation of overlapping and increasingly severe federal conspiracy laws. In Brown v. Ohio, this Court stated that

> The Double Jeopardy Clause is not such a fragile guarantee that prosecutors can avoid its limitations by the simple expedient of dividing a single crime into a series of temporal or spatial units.

432 U.S. 166, 169 (1977). If this us to remain true, this Court must not stand silent and allow the fundamental right against double jeopardy to be abrogated by mere forms of pleading.

B. An Important Question is Presented Concerning What Showing Must be Made by the Government to Justify Successive Prosecutions for Conspiracy Against an Accused in the Face of Extensive and Unequivocal Evidence Offered by the Accused, Including Direct Testimonial and Documentary Admissions by the Government's Own Investigating Agents, That Both Prosecutions Are Based Upon One and the Same Agreement.

In addition to requiring a coherent frame of analysis for determining the unity vel non of successively charged conspiracies, Abney also requires that there be "rules about going forward with proof,

burden of persuasion, and weight of the evidence." United States v. Inmon, 568 F.2d 326, 329 (3d Cir. 1977). In Inmon, the court held that while the defendant has the burden of going forward by putting his double jeopardy claim in issue, once he has made a non-frivolous showing, the burden of persuasion shifts to the government to demonstrate by a preponderance of the evidence that the two conspiracies charged are in fact separate. The Inmon court offered a compelling rationale for the shifting of the burden of proof:

> [The defendant] would be required to prove facts establishing the charge of conspiracy to which he pleaded guilty and to prove facts establishing the second conspiracy as well. How he could do either, without access to the proof on which the government proposed to rely and without the ability to offer immunity to prospective witnesses, is not readily apparent. Even after a trial on the first indictment, the defendant would lack access to the government's proof of the second offense.

Id. at 329-30. Further,

> Besides the practical considerations respecting access to proof, to which we referred earlier, we also point to the

> obvious fact that it is the government which has control over the drafting of indictments. Any burden imposed by the imprecision in the description of separate offenses should be borne by it.

Id. at 332. Opinions in the Second, Fifth and Sixth Circuits have also shifted the burden of proof to the government upon a prima facie showing by the accused. United States v. Mallah, supra; United States v. Stricklin, supra; United States v. Jabara, supra. At least one circuit, the Tenth, has adhered to the conflicting view that the accused must bear the burden of proving his claim that he is being reprosecuted for the same conspiracy. United States v. Martinez, supra, 562 F.2d at 638. The view of the Ninth Circuit is unclear. See Sanchez v. United States, 341 F.2d 225, 227 (9th Cir.), cert. denied 382 U.S. 856 (1965) (burden of proof on defendant); United States v. Bendis, 681 F.2d 561 (9th Cir. 1981) (unclear whether burden of persuasion or merely of production shifts to govt.); United States v. Allen, 539 F. Supp. 296

(C.D. Cal. 1982) (burden of "establishing" single conspiracy on defendant).

The Court of Appeals below did acknowledge that the government had the burden to prove the existence of separate conspiracies. The Court of Appeals then cryptically stated that

> the government is not compelled to come forward with any particular kind of evidence. It may present however, much or little evidence as it deems advisable, subject, of course, to dismissal of the indictment if not enough evidence to rebut the defendant's prima facie showing is introduced.

723 F.2d at 1263, App. at A-49-50, citing United States v. Stricklin, supra.

The Court of Appeals' statement would make sense if the evidence below was in conflict. However, as has been repeatedly shown, in the face of the overwhelming evidence offered by petitioner, including documentary proof and the unequivocal admission of all three of the testifying government agents, the government essentially stood mute.

The Court of Appeals discounted the startling testimony of the government's agents, stating that "as non-lawyers, the agents held no position of expertise in the area of conspiracy law." Id. at 1258; App. at A-30-31. But the agents were not asked to express opinions on complex questions of conspiracy law. The agents, who had devoted years of their professional lives to this ivestigation, were asked about the factual results of their investigations, precisely the area in which they are expert. And they testified unanimously that, as a factual matter, their investigations had shown that the very same organization charged in the current indictment with controlling the gambling and drug rackets in Cleveland also controlled the loansharking racket. It can well be asked, "What more must an accused do to support his double jeopardy claim?"

Even if, however, the testimony of the government agents is ignored for the sake of argument, the point remains that the govern-

ment could not have met its burden because it produced no evidence that the two conspiracies are in fact the same. Under these circumstances, the only conceivable explanation for the Sixth Circuit's decision is that it allowed the allegations of the indictments to take the place of evidence. Not only does this contravene the principle that the government may not manipulate the allegations in an indictment arbitrarily to subdivide a conspiracy, it also erroneously allows mere allegations to suffice as evidence.

It is, of course, not surprising that the glaring error committed in this case occurred. Even a cursory review of the authorities cited herein demonstrates that the interface of conspiracy law and double jeopardy principles has produced a tangled and conflicting body of law. Moreover, the decisions cited herein represent a small fraction of the increasing number of cases arising as the result of the ever expanding

federal conspiracy laws and of the ever increasing number of indictments charging every conceivable conspiracy or substantive offense arising out of a single course of criminal conduct. With one of our most cherished liberties at stake, it is incumbent upon this Court to provide the guidance to prevent the Double Jeopardy Clause from being rendered a nullity in the context of conspiracy prosecutions.

II. AN IMPORTANT QUESTION IS PRESENTED AS TO WHETHER THE OFFENSES OF CONTINUING CRIMINAL ENTERPRISE, 21 U.S.C. §848, AND RICO CONSPIRACY, 18 U.S.C. §1962(d), ARE, IN RELATION TO EACH OTHER GREATER AND LESSER OFFENSES AND THEREFORE THE SAME FOR DOUBLE JEOPARDY PURPOSES, SO THAT A CONVICTION OF RICO CONSPIRACY BARS A SUBSEQUENT PROSECUTION FOR CONTINUING CRIMINAL ENTERPRISE ARISING OUT OF THE SAME CRIMINAL AGREEMENT.

As part of a comprehensive effort to increase federal involvement in the war against organized crime, Congress in 1970 enacted two conspiracy offenses of unprece-

dented scope and severity,[7] the Continuing Criminal Enterprise and the RICO conspiracy. The broad and overlapping reach of these two provisions creates an increasing risk that charges will be routinely pursued under both provisions in cases involving alleged drug conspiracies. Such an aggressive approach poses grave risks to the Fifth Amendment Right against Double Jeopardy, which must be addressed in the present case.

It is well established by this Court that the Double Jeopardy Clause bars the government from prosecuting a defendant for an offense when he has already been convicted of a related lesser included offense, because the greater and lesser offenses are,

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[7] The Continuing Criminal Enterprise statute provides, even for first offender, imprisonment for a minimum of ten years to a maximum of life and fines of up to $100,000. The statute also forbids suspended sentences, probation and parole. 21 U.S.C. §848(a), (c). RICO conspiracy is punishable by prison terms of up to twenty years and fines of up to $25,000. 18 U.S.C. §1963(a). In addition, forfeiture provisions and civil treble damages are provided for. 18 U.S.C. §1963(c); §1964.

for purposes of the Clause, the same. Illinois v. Vitale, 447 U.S. 410 (1980); Brown v. Ohio, supra.

In Brown and Vitale this Court held that the question of whether two offenses are the greater and lesser included offenses for the purpose of barring successive prosecutions depends upon "whether each provision requires proof of a fact which the other does not," citing Blockburger v. United States, 284 U.S. 299, 304 (1932). Thus, offenses are, in relation to each other greater and lesser included offenses, and therefore the same for double jeopardy purposes, if proof of the greater offense will necessarily require proof of the lesser.

Under 28 U.S.C. §848:

> ...a person is engaged in a continuing criminal enterprise if--
>
> (1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and
>
> (2) such violation is a part of a continuing series of violations of this

subchapter or subchapter II of this chapter--

> (A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and
>
> (B) from which such person obtains substantial income or resources.

Thus, in order to prove a violation of this statute, the government must prove the following elements: (1) that the defendant was a member of a conspiracy; (2) that the conspiracy involved at least five other persons; (3) acting under the defendant's control or supervision; (4) that the defendant in concert with his co-conspirators committed a series of federal drug offenses (which has been construed as meaning at least three); and (5) that from this continuing series of drug offenses the defendant has obtained substantial income or resources. See Jeffers v. United States, 432 U.S. 137 (1977); United States v. Michel, 588 F.2d 986, 1000 (5th Cir. 1979);

United States v. Phillips, 664 F.2d 971, 1012-1013 (5th Cir. 1981).

If the government proves the above elements, it will also necessarily have proven: (1) that the defendant is a member of a conspiracy, (2) that, as manager or supervisor, he agreed to participate in an enterprise (i.e. "any union or group of individuals associated in fact although not a legal entity"), (3) through the commission of at least two federal drug offenses - and, thereby the government will have proven a RICO conspiracy. Since it is theoretically impossible to prove a Continuing Criminal Enterprise without also proving a RICO conspiracy, the latter is a lesser included offense of the former and and the prosecution of the greater offense after a previous conviction upon the lesser offense is barred. Illinois v. Vitale, supra; Brown v. Ohio, supra.

The court below relied upon United States v. Phillips, supra, in holding that

RICO conspiracy was not a lesser included offense of Continuing Criminal Enterprise. This holding was premised upon the determination that proof of a Continuing Criminal Enterprise would not necessarily entail proof of the "enterprise" element of a RICO conspiracy.[8] Petitioner submits that this determination was premised upon two independent misconceptions regarding the scope of the pertinent offenses, both of which were necessary to reach the erroneous result.

First, the court below gave an unduly restrictive reading to the definition of "enterprise" which includes

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[8] The Court of Appeals' opinion also emphasizes the elements of Continuing Criminal Enterprise not required for proof of RICO conspiracy. For example, the court points out that the Continuing Criminal Enterprise offense requires five or more persons to be involved and that the defendant occupy a supervisory status. This, however, only establishes that Continuing Criminal Enterprise is the greater offense, which by definition will always require proof of one or more additional elements. Illinois v. Vitale, supra; Brown v. Ohio, supra.

> any individual, ...and any union or group of individuals associated in fact although not a legal entity.

18 U.S.C. §1961 (Emphasis added).

Under this definition, the RICO enterprise can be as small as a single individual and it can include both legitimate enterprises as well as enterprises formed solely for the commission of unlawful acts. United States v. Turkette, 452 U.S. 576 (1981). While the enterprise is not simply the pattern of racketeering activity, it need only be any group of persons, no matter how few, associated in fact to carry on illegal activities. Id. See also United States v. Lemm, 680 F.2d 1193, 1198 (8th Cir. 1983). In fact, defendants seeking to argue that a RICO enterprise requires an ascertainable structure of some rigidity have repeatedly met with failure, since the RICO enterprise reaches "any group of individuals 'whose association, however loose or informal, furnishes a vehicle for the commission of two or more predicate crimes.'" United

States v. Cangina, 697 F.2d 915 (11th Cir. 1983), citing United States v. Elliot, 571 F.2d 880, 898 (5th Cir.), cert. denied 439 U.S. 953 (1973). See also United States v. Lemm, supra.

Conversely, the court below in construing the scope of a Continuing Criminal Enterprise, disregarded the fact that §848 additionally requires proof that the defendant occupied "a position of organizer, a supervisory position, or any other position of management" with respect to his five or more co-conspirators. Proof of that element necessarily entails proof of an enterprise of at least if not greater structural organization than a RICO enterprise. Quite clearly then, proof of a scheme to engage in a §848 enterprise will necessarily entail

proof of a conspiracy to engage in a RICO conspiracy.[9]

Given the expanding scope of federal involvement in drug prosecutions, it can only be expected that the practice of bringing simultaneous or consecutive prosecution under CCE and RICO conspiracy will continue. Given this situation, the importance of the issues presented herein and the danger posed to the rights secured by the Double Jeopardy Clause cannot be underestimated. This Court should grant certiorari to address this threat and to correct the grave error committed by the court below.

## CONCLUSION

Thirty-five years ago, Justice Jackson warned of the grave danger to fundamental

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[9] The §848 enterprise must always be one which affects interstate commerce given the fact that the very power of Congress to enact the federal drug laws is derived from the Commerce Clause. United States v. Lopez, 459 F.2d 949 (5th Cir.), cert. denied 409 U.S. 878 (1972).

liberties imposed by the expansion of the federal law of conspiracy:

> The unavailing protest of courts against the growing habit to indict for conspiracy in lieu of prosecuting for the subtantive offense itself, or in addition thereto, suggests that loose practice as to this offense constitutes a serious threat to fairness in our administration of justice.

Krulewitch v. United States, 336 U.S. 440 (1949) (concurring opinion). But Justice Jackson could hardly have envisioned the dire threat posed to the right against double jeopardy by the wave of new and powerful federal conspiracy laws.

> [A]t common law, and under early federal criminal statutes, offense categories were relatively few and distinct. A single course of criminal conduct was likely to yield but a single offense. In more recent times, with the advent of specificity in draftmanship and the extraordinary proliferation of overlapping and related statutory offenses, it became possible for prosecutors to spin out a startlingly numerous series of offenses from a single alleged criminal transaction. As the number of statutory offenses multiplied, the potential for unfair and abusive reprosecutions became far more pronounced.

Ashe v. Swenson, 397 U.S. 436, 445 n. 10 (1970).

Certainly, Congress enacted broad and overlapping conspiracy provisions in order to deal with a large problem. It is precisely in this area, however, that the line between prosecutorial fervor and abuse of fundamental constitutional rights must be most boldly drawn.

The petitioner is not before this Court contesting the government's right to prosecute its 68 remaining counts against him. Nor is he here seeking to challenge the punishment he is currently enduring for his conspiracy conviction. He seeks only to have respected his sacred constitutional right not to be twice tried and punished for the same offense.

The lack of guidance for the lower courts has left the door wide open for the brazen violation of the Fifth Amendent right against double jeopardy. While the cause of those accused or convicted of breaking the law may not invoke great sympathy, in the long run the rule of law can only suffer

grievously when the rights of the unpopular are ignored.

This Court should grant certiorari to resolve the confusion among the lower courts and to prevent the emasculation of a vitally important constitutional right.

Respectfully submitted,

BERNARD A. BERKMAN
J. MICHAEL MURRAY
BERKMAN, GORDON, MURRAY and PALDA
2121 The Illuminating Building
55 Public Square
Cleveland, Ohio 44113
(216) 781-5245

Attorneys for Petitioner

Of Counsel:

RICHARD T. BUSH

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No. 82-3712
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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| UNITED STATES OF AMERICA | ) | |
| | ) | ORDER DENYING |
| v. | ) | PETITION FOR |
| | ) | REHEARING EN |
| THOMAS J. SINITO | ) | BANC |

Before: KEITH, KENNEDY and WELLFORD, Circuit Judges

A majority of the judges of the court having not favored rehearing en banc, the petition for rehearing has been referred to the hearing panel for disposition.

Upon consideration, the court concludes that the petition for rehearing is without merit. Accordingly, it is ORDERED that rehearing be and hereby is denied.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman

UNITED STATES of America
Plaintiff-Appellee,

v.

Thomas James SINITO
Defendant-Appellant.

No. 82-3712.

United States Court of Appeals
Sixth Circuit.

Argued Aug. 4, 1983.

Decided Dec. 23, 1983.

Rehearing and Rehearing En Banc
Denied Feb. 8, 1984

[1252]
Bernard A. Berkman, Berkman, Gordon, Murray & Palda, J. Michael Murray (argued), Cleveland Ohio, for defendant-appellant.

Mervyn Hamburg (argued), Washington, D.C., for plaintiff-appellee.

Before KEITH, KENNEDY and WELLFORD, Circuit Judges.

KEITH, Circuit Judge.

Pursuant to Abney v. United States,[1] 431 U.S. 651, 97 S.Ct. 2034, 52 L.Ed.d 651

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[1] In Abney, the Supreme Court held that the denial of a motion to dismiss an indictment on double jeopardy grounds is immediately appealable.

(1977), defendant Thomas Sinito appeals a pretrial order of the district court which denied his motion to dismiss counts one and [1253] two of his seventy-count indictment.[2] Counts one and two of the indictment charged defendant and five others with violation of the Racketeer Influenced and Corrupt Organizations Statute (RICO), 18 U.S.C. §1962(c) and (d)[3] and operation of a continuing

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[2] Originally, the indictment charged a total of seventy-four counts and was returned by the grand jury on July 6, 1982. Four of the counts were deleted because Carmen Zagaria, the only defendant named in these counts, was transformed into an unindicted co-conspirator as a result of a plea bargaining agreement with the government. A superseded indictment was returned on October 27, 1982. The only difference between these two indictments was the omission of Carmen Zagaria.

[3] 18 U.S.C. §1962 provides in relevant parts:

> (c) It shall be unlawful for any person employed by or associated witih any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or

(Footnote continued)

criminal enterprise, 21 U.S.C. §848.[4] The indictment charged that defendant was a member of organized crime who, along with others, used threats of violence and

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indirectly, in the conduct of such enterprises's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), or (b), or (c) of this section.

[4] A person is engaged in a continuing criminal enterprise if -

(1) he violates any provision of this subchapter or subchapter II of this chapter [pertaining to narcotics trafficking] the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter -

(A) which are undertaken by such person in concert with five or more other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

21 U.S.C. §848.

committed acts of murder in order to protect the organization's illegal drug and gambling activities.

This case raises the difficult question of whether the separate conspiracies charged in different grand jury indictments are, in reality, one for the purposes of the fifth amendment prohibition against double jeopardy.

## I.

## FACTS

### 1981 Indictment (Sinito I)

On April 10, 1981, defendant Sinito and his cousin, Charles Sinito, were charged in an eighteen count indictment (Sinito I) with a RICO conspiracy, 18 U.S.C. §1962(d), the completed substantive RICO offense, 18 U.S.C. §1962(c), conspiracy to make extortionate extensions of credit, 18 U.S.C. §892, the collection of extensions of credit by extortionate means, 18 U.S.C. §894 and, as to defendant

alone, income tax evasion, 26 U.S.C. §7201, and filing of a false tax return, 26 U.S.C. §7206. The predicate acts underlying the charges involved violations of the federal loansharking laws. Sinito conducted a loansharking operation out of the Appliance Mart, an appliance store owned by Charles Sinito. The indictment identified twelve victims of the loansharking racket and stated that the activity occurred between March 1, 1974 and January 30, 1979.

The trial of Sinito commenced on July 16, 1981. The jury found defendant guilty on August 3, 1981 of the RICO conspiracy and several of the substantive counts. Defendant Sinito received a sentence of eighteen years and a twenty-thousand dollar fine.[5] 1982 Indictment (Sinito II).

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[5] The sentence was affirmed by our Court on March 29, 1983, Case No. 81-3624.

The following year, on October 27, 1982, Sinito, along with four other individuals, were named as defendants in a new seventy-count indictment (Sinito II). Count one charged Sinito, Joseph Gallo, Frederick Graewe, Hartmut Graewe and Kevin McTaggart with a RICO conspiracy in violation of 18 U.S.C. §1962(c). The indictment alleged these men belonged to an enterprise known as the "Cleveland Organized Crime Family," the "Outfit," the [1254] "Organization," or the "Mafia," and that this organization was used in a conspiracy to facilitate illegal drug and gambling activities. The predicate acts involved were murder, gambling and obstruction of justice. Count two charged the aforementioned defendants and Angelo Lonardo[6] with engaging in a continuing criminal enterprise involving the distri-

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[6] Angelo Lonardo is the reputed "Boss" of the Cleveland Organized Crime Family.

bution and possession of illegal narcotics, from which they derived substantial income in violation of 21 U.S.C. §848. The remainder of the seventy counts in the indictment charged defendants with interstate travel in aid of racketeering, 18 U.S.C. §1952, possession with intent to distribute and distribution of controlled substances, 21 U.S.C. §841, and use of a telephone to facilitate the distribution of controlled substances, 21 U.S.C. §843(b). Only counts one and two in the second indictment are the subjects of this appeal.

On September 23, 1982, Sinito filed a motion in the United States District Court in Ohio to dismiss the indictment. In his motion he raised two issues. First, he contends that count one of the indictment was barred by the double jeopardy clause because he was tried and convicted a year earlier of a RICO offense. Sinito argues

that in reality there is but one conspiracy and that prosecution under the second indictment violates his fifth amendment guarantee against double jeopardy. Second, he claims that count one of the second indictment is a lesser included offense of count two, and therefore count two also violates the double jeopardy clause.

An evidentiary hearing was held on October 19, 1982 to determine the merits of Sinito's claims. Three special investigating officers testified at that hearing. Case Agent Herbert Cohrs had worked on the investigation which culminated in the loansharking indictment the year before. He also participated in the investigation of the present RICO conspiracy. It was his opinion that while the witnesses in the two cases differed, there

was an overlap of the parties involved in the two indictments.[7]

Cohrs testified that he had read reports from other investigating officers which indicated the existence of one massive criminal conspiracy in Cleveland,

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[7] For example, at the loansharking trial it was disclosed that Angelo Lonardo provided the funds to Sinito, who in turn loaned them to the victims. Agent Cohrs also testified that one of the loansharking witnesses had told him that Sinito was involved in drugs as far back as 1974, and that Lonardo was seen at the Appliance Mart in 1974, and was believed to be Sinito's financial backer. Two other government witnesses at the loansharking trial testified that appellant was connected with Angelo Lonardo. Lonardo is named as a defendant in count two of the present indictment.

Agent Cohrs provided testimony concerning another individual who was involved in both the loansharking and the present drug indictments. Cohrs testified that at the loansharking trial an attempt had been made to enter into evidence checks written by Carmen Zagaria in payment of a debt owed to defendant Sinito. As further evidence of one conspiracy, appellant claims that Zagaria was a victim of his loansharking operation. Zagaria will be a principal government witness in the upcoming trial.

and in the past year he had learned that Sinito was a member.

Next to testify was Special Agent Dean Winslow, who was the investigating case agent in the present indictment. Winslow stated he had been aware of Sinito's involvement in loansharking since he was first assigned to the Cleveland office in 1978. He further testified that while he was unaware that Sinito's drug activities were financed through loansharking, a source had told him that this was true. Winslow also stated that, from his own investigation, he concluded there was one single conspiracy to control the various illegal rackets in Cleveland, and these rackets included drugs, gambling, and loansharking. It was his belief that Lonardo and James Licavoli were at the top of this organization and defendant Sinito was at the second level.

FBI agent George Grotz, who supervised the Organized Crime Squad in Cleveland, was the last witness to testify. He stated that he had worked on an indictment in 1978 which involved defendant and [1255] Lonardo.[8] Subsequently, Sinito was dismissed as a defendant in the indictment. Agent Grotz stated that through investigations he had concluded there was one massive conspiracy in Cleveland, controlled by the Mafia and organized to run gambling, drug trafficking and loansharking. Moreover, he believed that defendant Sinito, along with

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[8] On January 6, 1978, defendant Sinito, James T. Licavoli, John P. Calandra, Angelo Lonardo, Ronald Carrabia, Pasquale J. Cisternino, Alfred S. Calabrese and Aladena T. Fratianno were indicted for conspiracy to conduct racketeering activity in violation of 18 U.S.C. §1962(d). That indictment charged a RICO conspiracy of individuals associated to carry on and supervise loansharking, gambling, and murder, and other criminal activities in Ohio.

Lonardo and Joseph Gallo, were members of the conspiracy.

At the conclusion of the agents' testimony, defense counsel argued the government had artificially divided a single alleged conspiracy to control the drug, gambling and loansharking racket in the Cleveland area into two alleged conspiracies; one smaller conspiracy to control loansharking and another far larger conspiracy to control the other rackets. Defendant contends that since there was only one conspiracy involving loansharking, gambling and drugs, to again prosecute Sinito for the conspiracy uopn which he had already been prosecuted, convicted, and sentenced would violate the double jeopardy clause.

The government's position was that the evidence produced at the forthcoming trial would not duplicate the evidence used to previously convict appellant.

Moreover, the prior conviction for RICO related solely to loansharking and did not immunize defendant from criminal liability for all other misdeeds.

In a memorandum opinion, the district court denied defendant's motion to dismiss. The court relied upon the totality of circumstances test enunciated in United States v. Jabara, 644 F.2d 574 (6th Cir. 1981) to conclude the conspiracy alleged in the prior loansharking indictment differed from the conspiracy alleged in the present indictment. Thus, defendant had not been twice placed in jeopardy. Also, in reliance on United States v. Phillips, 664 F.2d 971 (5th Cir. 1981), cert. denied, 457 U.S. 1136, 102 S.C. 2965, 73 L.Ed.2d 1354 (1982), the court found the RICO count was not a lesser included offense of the continuing criminal enterprise count, and therefore this claim lacked merit. For the reasons

set forth below, we affirm the decision of the district court.

II.

DOUBLE JEOPARDY AND MULTIPLE PROSECUTIONS UNDER RICO

The fifth amendment in part provides that no person shall "be subject for the same offense to be twice put in jeopardy of life or limb." Thus, the double jeopardy clause provides a guarantee that "the State with all its resources and power [shall] not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continued state of anxiety and insecurity...." United States v. Tercero, 580 F.2d 312, 314 (8th Cir. 1978) (quoting Green v. United States, 355 U.S. 184, 187, 78 S.Ct. 221, 223, 2 L.Ed.2d 199 (1957)).

The double jeopardy clause has traditionally provided a bulwark against

both multiple punishments as well as multiple prosecutions for the same offense. Brown v. Ohio, 432 U.S. 161, 165, 97 S.Ct. 2221, 2225, 53 L.Ed.2d 187 (1977); North Carolina v. Pearce, 395 U.S. 711, 717, 89 S.Ct. 2072, 2076, 23 L.Ed.2d 656 (1969).

The test to determine whether two offenses are the same was first enunciated in Blockburger v. United States, 284 U.S. 299, 304, 52 S.Ct. 180, 182, 76 L.Ed. 306 (1932). In Blockburger, the Supreme Court said:

> [t]he applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether these are two offenses or only one is whether each provision requires proof of fact which the other does not. A [1256] single act may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other (citations omitted).

Although Blockburger concerned the imposition of cumulative punishments, it is well recognized that "[i]f two offenses are the same under this test for purposes of barring consecutive sentences at a single trial, they necessarily will be the same for purposes of barring successive prosecutions." Brown v. Ohio, 432 U.S. at 166, 97 S.Ct. at 2226. Thus, under Blockburger, offenses are deemed identical for purposes of the double jeopardy clause where the evidence required to support conviction in one of the prosecutions is sufficient to support conviction in the other prosecution.

Application of the Blockburger test to the instant case would lead to the conclusion that the two indictments in question are not violative of the double jeopardy clause. Since both indictments charge different overt acts - loansharking in Sinito I, and murder, drug trafficking,

gambling and obstruction of justice in Sinito II, obviously the evidence required to prove each of the acts would be different. However, our inquiry does not stop here. In recent years courts have recognized the inherent infirmities in applying the same evidence test to conspiracy cases. The government, in a criminal conspiracy case, is often presented with a host of co-conspirators and a multiplicity of overt acts. An overzealous prosecutor, in drafting the indictment, could choose certain overt acts in one indictment and a different set of overt acts in a second indictment, thereby carving up one conspiracy into two or even more artificial offenses. However, such a dissection would circumvent a charge of double jeopardy, since each set of overt acts would require different evidence. The district court recognized this dilemma in

the instant case and refrained from applying the same evidence test.

In a conspiracy case it is the agreement which forms the nucleus of the offense. In Braverman v. United States, 317 U.S. 49, 53, 63 S.Ct. 99, 101, 87 L.Ed.23 (1942) the Court said, "[t]he gist of the crime of conspiracy as defined by the statute is the agreement." Therefore, a determination of whether the government can prosecute on more than one conspiracy rests on whether there exists more than one agreement.

The Totality of Circumstances Test

The district court found these indictments were based upon separate conspiracies by applying the totality of circumstances test set forth in United States v. Jabara, 644 F.2d 574 (6th Cir. 1981). In Jabara, the defendants had been indicted in Michigan for conspiracy to

violate the narcotics laws. These same defendants had been previously indicted in California for conspiracy to violate the same drug laws. The court dismissed the conspiracy count on grounds that both indictments arose from one conspiracy. The trial court considered the totality of the circumstances test and found there was but one conspiracy. This Court agreed. Such an approach has been applied by a number of circuits. United States v. Castro, 629 F.2d 456 (7th Cir. 1980); United States v. Tercero, 580 F.2d 312 (8th Cir. 1978); United States v. Marable, 578 F.2d 151 (5th Cir. 1978); United States v. Mallah, 503 F.2d 971 (2d cir. 1974), cert. denied, 420 U.S. 995, 95 S.Ct. 1425, 43 L.Ed.2d 671 (1975). The test requires the trial court, in determining whether two conspiracies arise from a single agreement, to consider the elements of: 1) time; 2) persons acting

as co-conspirators; 3) the statutory offenses charged in the indictments; 4) the overt acts charged by the government or any other description of the offenses charged which indicates the nature and scope of the activity which the government sought to punish in each case; and 5) places where the events alleged as part of the conspiracy took place. See United States v. Stricklin, 591 F.2d 1112 (5th Cir.), cert. denied, 444 U.S. 963, 100 S.Ct. 449, 62 L.Ed.2d 375 (1979); United States v. Marable, 578 F.2d at 154. Where several of these factors differ between the conspiracies, the conclusion follows that the alleged illegal conspiracies [1257] are separate and distinct offenses. United States v. Marable, supra; United States v. Mallah, 503 F.2d at 971. Following this analysis, we now turn to a determination of whether the two

separate conspiracies are in actuality one.

The first indictment, Sinito I, charges that the illegal loansharking acts took place between March 1, 1974 and January 30, 1979. The present indictment alleges that illegal activity occurred between March, 1978 and October 28, 1982. An overlap of ten months is not indicative of one conspiracy. In United States v. Inmon, 594 F.2d 352 (3rd Cir.), cert. denied, 444 U.S. 859, 100 S.Ct. 121, 62 L.Ed.2d 79 (1979), the time period in the first indictment completely subsumed the time period in the second indictment. Yet the court, in finding two conspiracies, stated: "[t]ime frames and personnel can overlap in separate criminal agreements. In a metropolitan area such as Pittsburgh, it is possible for more than one scheme involving the distribution of heroin to exist." Inmon, 594 F.2d at

354. Thus, it is not surprising there would be some overlap of time in the present case, particularly in light of the dissimilarities of the offenses charged in each indictment.

The second factor to consider is personnel. Each indictment involved a different set of participants with the exception of defendant Sinito. He was the only party charged in both indictments. This fact, of course, lends support to the district court's conclusion there were two conspiracies. However, it is not dispositive of the issue. Appellant, in arguing the existence of one conspiracy, relies upon a number of individuals who were associated with both indictments, although unnamed as defendants.

Angelo Lonardo, described as the head of the Cleveland Mafia, was mentioned in the loansharking trial as supplying Sinito with the financial backing for his loan-

sharking operation. Lonardo was also seen visiting the Appliance Mart on numerous occasions. In count two of the present indictment Lonardo is named as a defendant. This overlap in the two indictments appears tenuous at best, since Lonardo was neither charged in count one of the present indictment as a named defendant or unindicted co-conspirator, nor was he named as a co-defendant in the loansharking trial.

Appellant's offering of Carmen Zagaria as proof of one conspiracy is equally as tenuous. Zagaria's name appears in the investigation surrounding both indictments. At the loansharking trial, the government attempted to submit into evidence checks drawn by Zagaria in payment to Sinito. The government attempted to offer the checks as proof of payment for a loansharking debt. However, the checks were not admitted into evidence

and Zagaria did not testify at the loansharking trial. In the present indictment, Zagaria will be called as a principal government witness. According to the government, he will testify that the checks sought to be admitted into evidence at the loansharking trial were unrelated to loansharking. Rather they had been tendered in payment of drugs.

Finally, appellant asserts that a third individual, David Perrier, was associated with both cases. Perrier collected debts for defendant in his loansharking operation, but he was not named as a defendant in the loansharking indictment because he is deceased. In the present indictment, defendant is accused of killing Perrier on the orders of an unindicted co-conspirator.

The appearance of these three individuals: Lonardo, Zagaria and Perrier, in the investigations surrounding two indict-

ments does not lead to a conclusion there exists only one conspiracy. "The rule [against double jeopardy] does not apply where there are two distinct conspiracies, even though they may involve some of the same participants." United States v. Lurz, 666 F.2d 69, 74 (4th Cir. 1981), cert. denied _____ U.S. _____, 103 S.Ct. 95, 74 L.Ed.2d 87 (1982); United States v. Papa, 533 F.2d 815, 821-22 (2d Cir.), cert. denied, 429 U.S. 961, 97 S.Ct. 387, 50 L.Ed.2d 329 (1976). This case is readily distinguishable from those cases where it was found that only one conspiracy existed based on the overlap of personnel. For example, in United States v. Marable, 578 F.2d 151, 154 (5th Cir. 1978), [1258] the court found only one conspiracy. The cast of characters was identical in the indictment which charged conspiracy and distribution of heroin, with the exception of one individual, to

the characters involved in a subsequent indictment charging conspiracy and distribution of cocain. See also United States v. Tercero, 580 F.2d 312 (8th Cir. 1978) (the court found that artificially drawn indictments, alleging separate conspiracies, actually set forth only one conspiracy because the overlap in personnel in each indictment was significant). Here, unlike in Marable and Tercero, the personnel overlap in each alleged conspiracy is minuscule. The defendants charged in the loansharking case, with the exception of Sinito, are different from the individuals charged in the present indictment. The loansharking prosecution was aimed at Sinito and his cousin. The present indictment involves a host of figures, unmentioned in the loansharking trial and alleged to be active members of the Mafia. Indeed this organized crime connection plays a central theme in the

present indictment, but was avoided in the loansharking case.

Although both indictments charge violations of the same statute, 18 U.S.C. §1962(c) and (d), the underlying statutory offenses are different. Sinito I was based on the illegal collection of debts, i.e., loansharking. Sinito II charged defendant with associating as a member of an enterprise to engage in a pattern of racketeering activity, to wit: murder, drug trafficking and illegal gambling. The enterprise charged in the loansharking indictment, Sinito I, is the Appliance Mart, a corporation incorporated in the State of Ohio. It was from this enterprise that defendants conducted their loansharking activities. In the present indictment, the enterprise charged is "a group of individuals associated in fact to commit murder and violence ... in order to facilitate narcotics trafficking ... and

to remove threats to the enterprise by killing potential police informants ... in order to preserve the enterprise's control of the narcotics business in ... Cleveland." The enterprise to which the present indictment refers is Organized Crime or the Mafia. Clearly, it is distinguishable from the Appliance Mart, which was a supposed legal enterprise from which illegal loansharking was conducted.

The overt acts charged in the present indictment are murder, gamgling, drug trafficking and obstruction of justice. In Sinito I, the overt act was loansharking. Of course we recognize, as did the district court, that simply comparing different overt acts in the indictment does not accurately determine the issue. Such an inquiry would, as has already been stated, "permit the government arbitrarily to split unitary ... conspiracies and to initiate as many prosecutions." United

States v. Ruigomez, 576 F.2d 1149, 1151 (5th Cir. 1978). The more sound approach is a query of whether the particular acts alleged in the indictment are part of a larger, unified conspiracy for which the defendant has already been prosecuted. In the instant case, we are of the opinion that they are not. Prosecution of the acts charged in the present indictment indicates a clear and permissible intent to punish activity divorced from loan-sharking, which was the sole scope of the first indictment.

Finally, the agents' belief that they were investigating one massive conspiracy is not controlling. The testimony of the three agents was presented to the trial judge at the pretrial hearing. The trial judge considered their testimony in light of all the evidence, and was unpersuaded as to the existence of one continuing conspiracy. We agree. As non-lawyers,

the agents held no position of expertise in the area of conspiracy law. Their opinion as to the existence of one conspiracy, although entitled to consideration, is but one of the factors the court should and did consider in making a decision based on the totality of the evidence presented.

Defendant makes much ado about the geograhical locations set forth in the two indictments. Each indictment charged that events occurred in the Northern District of Ohio, Eastern Division and elsewhere. Standing alone, this fact is of minimum [1259] significance. As the district court noted, "it is unquestioned, however, that such an allegation is contained in each indictment for venue purposes."

Thus, the relevant factors: time, personnel overlap, the stautory offenses charged, the nature of the overt acts and the location, taken in concert, fail to

support defendant's claim that the indictment upon which he was previously charged and convicted is based on the same conspiracy for which he is presently charged.

III.

RICO AND CONTINUING CRIMINAL ENTERPRISE

The second prong of Sinito's double jeopardy argument is that the Continuing Criminal Enterprise and RICO conspiracy counts are, in relation to one another, greater and lesser included counts. Accordingly, to prosecute defendant on the Continuing Criminal Enterprise count, the greater offense, and a RICO conspiracy, the lesser included offense, violates the double jeopardy prohibition against multiple prosecutions.

We have already held that prosecution of Sinito on the RICO conspiracy charged in count one is not barred by the double jeopardy clause. However, even if the

RICO conspiracy in count one was barred by the RICO conspiracy of which defendant has already been convicted, there would be no bar to the Continuing Criminal Enterprise count because the offenses are separate crimes.

In order to determine whether two separately charged offenses are the same for purposes of barring successive prosecutions, one must again look to the same evidence test enunciated in Blockburger v. United States, 284 U.S. 299, 52 S.Ct. 180, 76 L.Ed. 306 (1932):

> where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not.

284 U.S. at 304, 52 S.Ct. at 182.

In Brown v. Ohio, 432 U.S. 161, 168-70, 97 S.Ct. 2221, 2226-28, 53 L.Ed.2d 187 (1977), the Supreme Court applied Blockburger to a case involving greater

and lesser included offenses.[9] The Court held that the double jeopardy clause barred indictment for a greater offense after conviction of the lesser included offense. The Court reasoned that the Blockburger test would not be met with the lesser included offense, joyriding, since no additional proof is needed to prove the lesser offense that is not needed to prove the greater offense.

A review of the present indictment shows that each offense requires proof of facts which the other does not, thus the Blockburger test is readily satisfied.

Count I charged defendant Sinito and four others with association in an enterprise to commit and threaten to commit acts of murder and violence in order to traffic drugs and conduct a gambling

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[9] In Brown, the defendant was first convicted of joyriding and then prosecuted for auto theft.

operation. This group of individuals was charged with conducting their affairs through a pattern of racketeering activities. The overt acts which the defendant was specifically charged included the operation of an illegal gambling business, the aggravated murder with premeditation of Keith Ritson, David Perrier and Joseph Giamo,[10] conspiracy to control the illegal drug and gambling market in Cleveland[11] and possession of over 60,000 qualude tablets, all in violation of 18 U.S.C. §§1961, 1962(c) and (d).

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[10] Allegedly, these individuals were shot because money was owed them or they threatened to disclose information concerning the illegal enterprise.

[11] The indictment alleges that unindicted co-conspirator Carmen Zagaria entered into a merger or partnership with defendant pursuant to which the Mafia, represented by defendant, would allow Zagaria to monopolize the Cleveland drug market and gambling enterprise, and all were to share in the profits.

[1260] Count 2 charged Sinito and the same four defendants with engaging in a continuing criminal enterprise, to wit: the distribution and possession with intent to distribute both Schedule I and II controlled substances.[12] This operation was conducted through interstate commerce in violation of 21 U.S.C. §843(b) and was undertaken by defendant in concert with at least five others, with whom he occupied a supervisory or managerial role[13] and from which he gained substan-

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12 These drugs included marijuana, hashish, lysergic acid diethylamide (LSD), cocaine, methaqualone and phencyclidine (PCP).

13 In the crime structure, Sinito allegedly was a direct subordinate to Angelo Lonardo - the "Boss" of the Cleveland Crime Family. Sinito played a role as financier and protector from rival encroachments. He also served a a buffer and conduit to Lonardo, by protecting him from criminal liability and relaying istructions to other members of the conspiracy.

tial income, all in violation of 21 U.S.C. §848.

Background on RICO

Congress' enactment of the Organized Crime Control Act of 1970 evinced a strong concern for the pervasiveness of organized crimes' control over virtually every aspect of American society and the government's heretofore limited capacity to control the problem. The statement of findings which prefaced the Act stated:

> [t]he Congress finds that (1) organized crime in the United States is a highly sophisticated, diversified, and widespread activity that annually drains billions of dollars from America's economy by unlawful conduct and the illegal use of force, fraud, and corruption.
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> * * * * * * *
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> (5) [O]rganized crime continues to grow because of defects in the evidence gathering process of the law inhibiting the development of the legally admissible evidence necessary to bring criminal and other sanctions or remedies to bear on the unlawful activities of those engaged in organized crime and because the sanctions and remedies available to the Govern-

ment are unnecessarily limited in scope and impact.

Of the ten titles comprising the Act, Title IX, entitled Racketeer Influenced and Corrupt Organizations (RICO) is perhaps the best known. Its purpose was to aid in the eradication of the malevolent forces of crime and corruption by broadening the sanctions and penalties available to the prosecutorial arm of the government.

The government, in order to prove a RICO violation under 18 U.S.C. §1962(c) must establish: (1) the existence of an enterprise which affects interstate or foreign commerce; (2) that the defendant "associated with" the enterprise; (3) that the defendant participated in the conduct of the enterprise's affairs; and (4) that the participation was through a pattern of

racketeering activity.[14] See United States v. Phillips, 664 F.2d 971 (5th Cir. 1981), cert, denied, 457 U.S. 1136, 102 S.Ct. 2965, 73 L.Ed.2d 1354 (1982); United States v. Bright, 630 F.2d 804 (5th Cir. 1980); United States v. Elliott, 571 F.2d 880, 897-99 (5th Cir.), cert. denied, 439 U.S. 953, 99 S.Ct. 349, 58 L.Ed.2d 344 1978).

In order to prove a RICO consiracy under 18 U.S.C. §1962(d), the government must establish, in addition to the aforementioned elements, the existence of an illicit agreement to violate the substan-

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[14] "Racketeering activity" means (a) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year.... §1961(1)(A). The federal crimes include such obvious organized crime related activities as bribery, counterfeiting, embezzlement from pension and welfare funds, mail fraud, obstruction of justice, extortion, illegal gambling, and manufacturing narcotics. §1961(1)(B).

tive RICO provisions. United States v. Phillips, 664 F.2d at 1012.

RICO requires proof of an enterprise plus a pattern of racketeering activity. An enterprise is defined as including "any individual partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact [1261] although not a legal entity." 18 U.S.C. §1961(4). This definition has been interpreted to mean both legitimate and illegitimate enterprises. United States v. Turkette, 452 U.S. 576, 587, 101 S.Ct. 2524, 2530, 69 L.Ed.2d 246 (1981). Racketeering activity means any activity indictable under the provisions of Title 18 and a pattern of racketeering activity requires at least two acts of the activities prohibited under Title 18.

Proof of an enterprise or pattern of racketeering activity, standing alone,

will not sustain a RICO conviction. As the court stated in United States v. Elliott, supra:

> The gravamen of the conspiracy charge in this case is not that each defendant agreed to commit arson, to obstruct justice and to sell narcotics; rather, it is that each agreed to participate, directly and indirectly, in the affairs of the enterprise by committing two or more predicate acts.

571 F.2d at 902.

It is unnecessary that the underlying predicate acts be interrelated as long as the acts are connected to the affairs of the enterprise. United States v. Phillips, 664 F.2d at 1011; United States v. Elliott, 571 F.2d at 899 n. 23. Moreover, the defendant's participation in the enterprise may take place through the offense of various crimes unrelated to one another as long as these crimes are in some way intended to further the enterprise's affairs. Phillips, at 1012; Elliott, at 902-3.

In addition to proving the aforementioned elements, proof of a RICO conspiracy requires the existence of an agreement. An agreement can be shown if "the defendant ... objectively manifested an agreement to participate directly or indirectly in the affairs of an enterprise through the commission of two or more predicate crimes."

Continuing Criminal Enterprise

The government, in order to prove a continuing criminal enterprise in violation of 21 U.S.C. §848, must show that the defendant: 1) engaged in a continuing series of federal drug felony violations; 2) that were undertaken in concert with five or more persons; 3) with respect to whom he occupied a position of organizer, supervisor or some other managerial status; and 4) from which defendant had obtained substantial income or

resources. United States v. Michel, 588 F.2d 986, 1000 n. 14 (5th Cir.), cert. denied, 444 U.S. 825, 100 S.Ct. 47, 62 L.Ed.2d 32 (1979).

The relationship requirement in a §848 case is flexible. The defendant's relationship with the five other individuals need not exist at the same moment in time. There can exist separate, individual relations with the five persons. United States v. Phillips, supra. And, the five individuals need not act at the same time. United States v. Bolts, 558 F.2d 316, 320-21 (5th Cir.), cert. denied, 439 U.S. 898, 99 S.Ct. 262, 58 L.Ed.2d 246 (1977).

The continuing series element in a continuing criminal enterprise is established by proof of three or more related narcotic violations. United States v. Valenzuela, 596 F.2d 1361, 1367 (9th Cir.), cert. denied, 444 U.S. 865,

100 S.Ct. 136, 62 L.Ed.2 88 (1979); United States v. Johnson, 585 F.2d 1347, 1357 (5th Cir. 1978), cert. denied, 440 U.S. 907, 99 S.Ct. 1214, 59 L.Ed.2d 454 (1979).

The continuing criminal enterprise law is a conspiracy statute of unique proportions. As the Supreme Court recognized in Jeffers v. United States. 432 U.S. 137, 149, 97 S.Ct. 2207, 2215, 53 L.Ed.2d 168 (1977), a §848 case requires proof of an agreement and in that respect it is indistinguishable from a standard conspiracy statute. However, unlike a typical conspiracy statute which proscribes an inchoate offense, §848 requires proof of a substantive violation. United States v. Phillips, 664 F.2d 971 (5th Cir. 1981). Finally, §848, commonly referred to as the "Kingpin" statute, is directly aimed at the organizers and leaders of narcotics operations. United States v. Webster, 639 F.2d 174 (4th Cir. [1262]

1981), cert. denied, 456 U.S. 935, 102 S.Ct. 1991, 72 L.Ed.2d 455 1982).

RICO and Continuing Criminal Enterprise Are Not Greater and Lesser Included Offenses.

The differences between the RICO and the Continuing Criminal Enterprise statutes are readily apparent and support a finding that the offenses are separate and distinct for purposes of the double jeopardy clause.

RICO encompasses any pattern of racketeering activity proscribed by 18 U.S.C. §1961. Continuing Criminal Enterprise is limited solely to narcotics trafficking. RICO requires no minimum number of participants. A continuing criminal enterprise has an express requirement that a least five individuals be involved.

RICO is not addressed to any specific level of organized crime figure. In fact,

its breadth encompasses not only the illegal enterprise, i.e., the Mafia, but also the legitimate operation through which a pattern of racketeering activity is conducted. In contrast, the object of the Continuing Criminal Enterprise statute or "Kingpin" statute is specifically aimed at upper level crime figures who occupy a position of control in the narcotics netherworld.

Finally, RICO requires proof of an enterprise, whereas continuing Criminal Enterprise, using the term in a different context, makes no such requirement of proof. Although defendant argues that the two statutes employ the term "enterprise" in the same context, we do not agree. In a substantive or conspiracy RICO prosecution, the government has the burden of showing the existence of an enterprise that affects interstate commerce. United States v. Phillips, 664 F.2d 971 (5th Cir.

1981). The enterprise is proven by the existence of a continuing organization and by evidence that members function as a continuing unit. United States v. Phillips, supra, quoting United States v. Turkette, 452 U.S. 576, 583, 101 S.Ct. 2524, 2528, 69 L.Ed.2d 246 (1981). Moreover, the government must show where the enterprise was furthered through a pattern of racketeering activity. In contrast, §848 merely requires proof that the defendant undertook a series of violations in concert or in conspiracy with five or more persons. The existence of an enterprise is not a required element. United States v. Phillips, 664 F.2d at 1013-14. Additionally, there is no requirement that the objective under §848 be to further the group. The commission of the violations is sufficient.

The untenability of defendant's position is further manifested by the

dearth of case law to support his claim that RICO is a lesser included offense of §848. The only case which has squarely addressed this issue conclusively found that RICO is not a lesser included offense of §848. In United States v. Phillips, supra:

> [w]e conclude that RICO counts are not lesser included offenses of the §848 count. Both the substantive RICO and RICO conspiracy counts require proof of facts and elements not required to be proved under §848, even though there is a substantial overlap in the proof offered to establish the crime.

664 F.2d at 1014.

See also United States v. Webster, 639 F.2d 174 (4th Cir. 1981), cert. denied, 456 U.S. 935, 102 S.Ct. 1991, 72 L.Ed.2d 455 (1982); United States v. Mannino, 635 F.2d 100 (2d Cir. 1980) (double jeopardy-same offense problems were not discussed where RICO and §848 charges were brought against defendant in the same indictment).

IV.

BURDEN OF PROOF AT EVIDENTIARY HEARING

Finally, Sinito argues that the government failed to meet its burden of proof at the evidentiary hearing. In particular, Sinito claims the government failed to offer testimonial or documentary evidence to rebut his claim that he was being twice prosecuted for the same offense. We do not agree with that argument. In United States v. Jabara, 644 F.2d 574, (6th Cir. 1981), this Court held that it was "appropriate [1263] for a trial court, confronted with a non-frivolous double jeopardy claim to shift to the government the burden of proving, by a preponderance of the evidence, that it is not seeking to prosecute the same offense a second time." Apparently, defendant would have this Court require the government to present a certain number of witnesses or specific amount of evi-

dence in order to carry its burden of proof. This, we will not do. As the court recognized in United States v. Stricklin, 591 F.2d 1112 (5th Cir.), cert. denied, 444 U.S. 963, 100 S.Ct. 449, 62 L.Ed.2d 375 (1979):

> [o]nce the burden of persuasion has shifted to the government ... the government is not compelled to come forward with any particular kind of evidence. It may present, however, much or little evidence as it deems advisable, subject, of course, to dismissal of the indictment if not enough evidence to rebut the defendant's prima facie showing is introduced.

591 F.2d at 1119.

Upon consideration of the parties' briefs, the testimony adduced at the hearing, the exhibits submitted into evidence, the facts delineated above and an in camera inspection of the transcripts of the proceedings before two grand juries which found probable cause to issue the indictments, the trial judge found the government had met its burden and that

Sinito's motion was without merit. We agree. Accordingly, we affirm the pretrial order of the district court, thereby allowing the government to proceed to trial.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | CASE NO. CR82-119 |
| Plaintiff, | ) | Judge John M. Manos |
| v. | ) | |
| JOSEPH CHARLES GALLO, et al., | ) | MEMORANDUM |
| Defendants. | ) | OF OPINION |

On January 6, 1978 Thomas Sinito, James T. Licavoli, John P. Calandra, Angelo Lonardo, Ronald Carabbia, Pasquale J. Cisternino, Alfred S. Calabrese and Aladena T. Fratianno were indicted for conpsiracy to conduct racketeering activity in violation of 18 U.S.C. §1962(d).[1] Subsequently, Sinito was dismissed as a defendant. On April 10, 1981 Sinito and his cousin, Charles Sinito, Jr., were indicted for engaging in and conspiracy to conduct, racketeering activity, extortionate extensions of credit and collections of extensions of

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1 CR78-2.

credit by extortionate means in violation of 18 U.S.C. §§1962(c), (d), 1963, 392(a), 894(a) and 2.[2] Sinito was also indicted on charges of income tax evasion and making false and fraudulent statements on his income tax returns in violation of 26 U.S.C. §§7201 and 7206. On August 3, 1981 Sinito was convicted of: (1) one count of engaging in racketeering activity in violation of 18 U.S.C. §1962(c); (2) one count of participating in a conspiracy to conduct racketeering activity in violation of 18 U.S.C. §1962(d); (3) one count of making an extortionate extension of credit in violation of 18 U.S.C. §892(a); (4) four counts of collections of extensions of credit by extortionate means in violation of 18 U.S.C. §§894(a) and 2; and (5) six counts of income tax evasion and making false and fraudulent statements on

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2 CR81-58.

his income tax returns in violation of 26 U.S.C. §§7201 and 7206. On October 16, 1981 this court sentenced Sinito to an eighteen year term of imprisonment and a $20,000 fine.

On July 6, 1982 Sinito, in addition to defendants, Joseph Gallo, Harmut Graewe, Frederick Graewe, Angelo Lonardo, Kevin Joseph McTaggart and Carmen Pasquale Zagaria were indicted for conspiracy, interstate travel in aid of racketeering activity, conspiracy to engage in racketeering activity, possession with an intent to distribute and distribution of, lysergic acid diethylamide (LSD), marijuana, cocaine, methaqualone and phencyclidine (PCP), use of a telephone to facilitate such distribution, operating a continuing criminal enterprise and attempting to evade and defeat income taxes in violation of 18 U.S.C. §§371, 1952(a), 1962(d) and 2, 21 U.S.C.

§§841(a)(1), 843(b) and 848 and 26 U.S.C. §7201. On September 23, 1982 Sinito filed a motion to dismiss count one of the indictment, which charges conspiracy to engage in racketeering activity in violation of 18 U.S.C. §1962(d) and count two, which charges the operation of a continuing criminal enterprise in violation of 21 U.S.C. §848, because those charges violate his right to be free from double jeopardy under the Fifth Amendment. On October 19, 1982 this court held a hearing on Sinito's claim. See: United States v. Jabara, 644 F.2d 574 (6th Cir. 1981). For the reasons which follow his motion to dismiss is denied.

In United States v. Jabara, supra, the Sixth Circuit Court of Appeals held "that the test to be applied in deciding a double jeopardy motion to dismiss is the 'totality of the circumstances' test set forth in United States v. Tercero, 580

F.2d 312 (8th Cir. 1978)." 644 F.2d at 577. Under the Tercero standard the critical question presented is whether the "totality of circumtances" demonstrate that the conspiracies alleged in the indictments in issue "are in reality part of a single conspiracy." United States v. Tercero, 580 F.2d 313, 315 (8th Cir. 1978). (Footnote omitted). In United States v. Phillips, 664 F.2d 971, 1006, n. 50 (5th Cir. 1981), the Fifth Circuit Court of Appeals held, "[w]hether events charged in two indictments were part of a single agreement depends upon the following factors: (1) time, (2) persons acting as coconspirators, (3) the statutory offenses charged in the indictments, (4) the overt acts charged by the government or any other description of the offense charged which indicates the nature and scope of the activity which the government sought to punish in each case,

and (5) places where the events alleged as part of the conspiracy took place." (Citations omitted). See United States v. Stricklin, 591 F.2d 1112 (5th Cir.), cert. denied, 444 U.S. 963, 100 S.Ct. 449 (1979); United States v. Marable, 578 F.2d 151 (5th Cir. 1978).

The time periods charged in: (1) CR78-2, is May, 1976 through December 5, 1977; (2) CR81-58, March 1, 1974 through January 30, 1979; and (3) this case March, 1978 through July 6, 1982. Thus, there is some overlap in time.

The "persons acting as coconspirators" in the three indictments are diverse. Indeed, although Lonardo was named as a defendant in CR78-2 and in this case, the only person who is named in all three of the indictments is Sinito.

Among other offenses, each indictment charges a violation of 18 U.S.C. §1962(d). However, the "enterprises"

charged in each indictment are different.[3] In CR78-2 the enterprise charged is "a group of individuals associated in fact to commit, carry on and supervise loansharking, gambling, murder and other criminal activities in the Northern District of Ohio...." In CR81-58 the enterprise charged is "the Appliance Mart Inc.," a corporation incorporated in the State of Ohio. In this case the enterprise charged is "a group of persons [other than those indicted in CR78-2 except Sinito] associated in fact to commit acts of murder and violence, and to threaten acts of murder and violence, in violation of the laws of the State of Ohio, in order to facilitate the operation

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[3] 18 U.S.C. §1961(4) defines "enterprise" as follows:

> "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

of a narcotics trafficking and gambling enterprise by using terror to enforce internal discipline within the organization, to protect against drug 'ripoffs,' to guard against encroachment by rival criminal organizations, and to enhance the collection of debts owed to the enterprise in connection with gambling and narcotics, as well as to remove threats to the enterprise by killing potential police informants and competing drug traffickers in order to preserve the enterprises's control of the narcotics business in and about the city [sic] of Cleveland."

"[T]he overt acts charged by the government" are distinguishable in each case. In CR78-2, the overt acts charged are murders and aiding and abetting. In CR81-58 the overt acts charged are extortionate extensions of credit, collections of extensions of credit by extortionate means and usury. In this case the overt

acts charged are four (4) aggravated murders, threats to commit aggravated murder, conducting an illgal gambling operation and obstruction of a criminal investigation.

Finally, each indictment charges that "events" occurred "in the Northern District of Ohio, Eastern Division, and elsewhere," or, as in this case, "divers other districts" and, therefore, some overlap exists as to "places where the events alleged as part of the conspiracy took place." It is unquestioned, however, that such an allegation is contained in

each indictment for venue purposes. See, Fed. R. Crim. P. 18.[4]

With regard to the racketeering charge, the thrust of Sinito's motion is that "the government has artificially divided a single alleged conspiracy to control the drug, gambling and loansharking rackets in the Cleveland area into two alleged conspiracies - one smaller conspiracy to control loansharking and another far larger conspiracy to control the other rackets." Upon consideration of the briefs of the parties, the testimony adduced at the hearing, the exhibits received into evidence, the facts deline-

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[4] Fed. R. Crim. P. 18 provides as follows:

> Except as otherwise permitted by statute or by these rules, the prosecution shall be had in a district in which the offense was committed. The court shall fix the place of trial within the district with due regard to the convenience of the defendant and the witnesses and the prompt administration of justice.

ated above and an in camera inspection of the transcripts of the proceedings before the three grand juries which found probable cause to issue the indictments in question, the court finds Sinito's motion to be without merit. The three indictments concern different defendants, coconspirators and overt acts. Accordingly, the court finds that each indictment charges conspiratorial agreements that are separate and distinct from one another. Pursuant to the decision of the Sixth Circuit Court of Appeals in United States v. Lanci, 669 F.2d 391 (6th Cir. 1982), however, the court does not find that Sinito's motion is frivolous or that an appeal from this ruling would lack "any 'colorable foundation.'" 669 F.2d at 394.

Sinito also contends that the RICO conspiracy is a lesser-included offense of the continuing criminal enterprise and, therefore, should be dismissed.

Confronted with an identical contention in United States v. Phillips, supra, the Fifth Circuit Court of Appeals held:

> We conclude that the RICO counts are not lesser included offenses of the §848 count. Both the substantive RICO and RICO conspiracy counts require proof of facts and elements not required to be proved under §848, even though there is a substantial overlap in the proof offered to establish the crimes. In a substantive or conspiracy RICO prosecution the Government must prove the existence of an enterprise that affects interstate commerce. The existence of an enterprise is an element that is separate from the element of the pattern of racketeering activity in which the enterprise engages; the enterprise is proved by evidence of a continuing organization and by evidence that the members function as a continuing unit. United States v. Turkette, supra, 101 S.Ct. at 2528. Mere proof of a pattern of racketeering activity, i.e., commission of at least two acts of racketeering activity, is not sufficient to establish a RICO violation; there must also be proof of the existence of the enterprise itself. Section 848, by contrast, does not require proof of a RICO type enterprise. Rather §848 merely requires proof that the defendant undertook a continuing series of violations in concert or in conspiracy with five or more persons.

664 F.2d at 1013-1014. This court is persuaded by the Phillips decision. Therefore, the court holds Sinito's contention to be without merit.

Accordingly, the defendant's motion to dismiss counts 1 and 2 of the indictment is denied.[5]

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES DISTRICT JUDGE

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[5] The court's holding is unaffected by the filing of a superseding indictment on October 27, 1982.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

| | | |
|---|---|---|
| UNITED STATES OF AMERICA, | ) | CASE NO. CR82-119 |
| Plaintiff, | ) | Judge John M. Manos |
| v. | ) | |
| JOSEPH CHARLES GALLO, et al. | ) | |
| Defendants. | ) | O R D E R |

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, the defendant's motion to dismiss is denied.

IT IS SO ORDERED.

/s/ John M. Manos
UNITED STATES DISTRICT JUDGE

§1961. Definitions

As used in this chapter -

(1) "Racketeering activity" means (A) any act or threat involving murder, kidnaping, gambling, arson, robbery, bribery, extortion, or dealing in narcotic or other dangerous drugs, which is chargeable under State law and punishable by imprisonment for more than one year; (b) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds),

sections 891-894 (relating to extortionate credit transactions), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of State or local law enforcement), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition if illegal gambling businesses), sections 2314 and 2315 (relating to interstate transportation of stolen property), sections 2341-2346 (relating to trafficking in contraband cigar-

ettes), sections 2421-24 (relating to white slave traffic), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) relating to embezzlement from union funds), or(D) any offense involving fraud connected with a case under title 11, fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in narcotic or other dangerous drugs, punishable under any law of the United States;

(2) "State" means any State of the United States, the District of Columbia, the Commonwealth of Puerto Rico, any territory or possession of the United States, any political sub-

division, or any department, agency, or instrumentality thereof;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, c rporation, assocation, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means a debt (A) incurred or contracted in gambling activity which was in violation of the law of the United States, a State or political subdivision thereof, or which is unenforceable under State or Federal law in whole or in part as to principal or interest because of the laws relating to usury, and (B) which was incurred in connection with the business of gambling in violation of the law of the United States, a State or political subdivision thereof, or the business of lending money or a thing of value at a rate usurious under State or Federal law, where the usurious rate is at least twice the enforceable rate;

(7) "racketeering investigator" means any attorney or investigator so designated by the Attorney General and

charged with the duty of enforcing or carrying into effect this chapter;

(8) '"racketeering investigation" means any inquiry conducted by any racketeering investigator for the purpose of ascertaining whether any person has been involved in any violation of this chapter or of any final order, judgment, or decree of any court of the United States, duly entered in any case or proceeding arising under this chapter;

(9) "documentary material" includes any book, paper, document, record, recording, or other material; and

(10) "Attorney General" includes the Attorney General of the United States, the Deputy Attorney General of the United States, any Assistant Attorney General of the United States, or any employee of the Department of

Justice or any employee of any department or agency of the United States so designated by the Attorney General to carry out the powers conferred on the Attorney General by this chapter. Any department or agency so designated may use in ivestigations authorized by this chapter either the investigative provisions of this chapter or the investigative power of such department or agency otherwise conferred by law.

§1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market for purpose of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful

under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity of the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities

of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs thorugh a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsections (a), (b), or (c) of this subsection.

§1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined not more than $25,000 or imprisoned not more than twenty years, or both, and shall forfeit to the United States (1) any interest he has acquired or maintained in violation of section 1962, and (2) any interest in, security of, claim against, or property or contractual right of any kind affording a source of influence over, any enterprise which he has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962.

(b) In any action brought by the United States under this section, the district courts of the United States shall have jurisdiction to enter such restraining orders or prohibitions, or to take such other actions, including, but not

limited to, the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as it shall deem proper.

(c) Upon conviction of a person under this section the court shall authorize the Attorney General to seize all property or other interest declared forfeited under this section upon such terms and conditions as the court shall deem proper. If a property right or other interest is not exercisable or transferable for value by the United States, it shall expire, and shall not revert to the convicted person. All provisions of law relating to the disposition of property, or the proceeds from the sale thereof, or the remission or mitigation of forfeitures for violation of the customs laws, and the compromise of claims and the award of compensation to informers in respect of

such forfeitures shall apply to forfeitures incurred, or alleged to have been incurred, under the provisions of this section, insofar as applicable and not inconsistent with the provisions hereof. Such duties as are imposed upon the collector of customs or any other person with respect to the disposition of property under the customs laws shall be performed under this chapter by the Attorney General. The United States shall dispose of all such property as soon as commercially feasible, making due provision for the rights of innocent persons.

21 U.S.C. §848

§848. Continuing criminal enterprise

Penalties; forfeitures

(a)(1) Any person who engages in a continuing criminal enterprise shall be sentenced to a term of imprisonment which may not be less than 10 years and which may be up to life imprisonment, to a fine of not more than $100,000, and to the forfeiture prescribed in paragraph (2); except that if any person engages in such activity after one or more prior convictions of him under this section have become final, he shall be sentenced to a term of imprisonment which may not be less than 20 years and which may be up to life imprisonment, to a fine of not more than $200,000, and to the forfeiture prescribed in paragraph (2).

(2) Any person who is convicted under paragraph (1) of engaging in a continuing

criminal enterprise shall forfeit to the United States -

(A) the profits obtained by him in such enterprise, and

(B) any of his interest in, claim against, or property or contractual rights of any kind affording a source of influence over, such enterprise.

Continuing criminal enterprise defined

(b) For purposes of subsection (a) of this section, a person is engaged in a continuing criminal enterprise if -

(1) he violates any provision of this subchapter or subchapter II of this chapter the punishment for which is a felony, and

(2) such violation is a part of a continuing series of violations of this subchapter or subchapter II of this chapter -

(A) which are undertaken by such person in concert with five or more

other persons with respect to whom such person occupies a position of organizer, a supervisory position, or any other position of management, and

(B) from which such person obtains substantial income or resources.

Suspensionofsentenceandprobation prohibited

(c) In the case of any sentence imposed under this section, imposition or execution of such sentence shall not be suspended, probation shall not be granted, and section 4202 of Title 18 and the Act of July 15, 1932 (D.C. Code, secs. 24-203 to 24-207), shall not apply.

Jurisdiction of courts

(d) The district courts of the United States (including courts in the territories or possessions of the United States having jurisdiction under subsection (a) of this section) shall have jurisdiction

to enter such restraining orders or prohibitions, or to take such other actions, including the acceptance of satisfactory performance bonds, in connection with any property or other interest subject to forfeiture under this section, as they shall deem proper.

Office - Supreme Court, U.S
FILED
JUN 14 1984
ALEXANDER L. STEVAS,
CLERK

No. 83-1669

# In the Supreme Court of the United States

OCTOBER TERM, 1983

THOMAS JAMES SINITO, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
*Solicitor General*

STEPHEN S. TROTT
*Assistant Attorney General*

MERVYN HAMBURG
*Attorney*

*Department of Justice*
*Washington, D.C. 20530*
*(202) 633-2217*

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## QUESTIONS PRESENTED

1. Whether, under double jeopardy principles, petitioner's prosecution for RICO conspiracy with predicate offenses of murder, gambling and obstruction of justice is barred by his earlier conviction for RICO conspiracy involving loansharking activities as the predicate offenses.

2. Whether RICO conspiracy is a lesser included offense of engaging in a continuing criminal enterprise where some of the acts underlying the RICO conspiracy charge involve drug trafficking.

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# In the Supreme Court of the United States

OCTOBER TERM, 1983

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No. 83-1669

THOMAS JAMES SINITO, PETITIONER

*v.*

UNITED STATES OF AMERICA

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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### OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A51) is reported at 723 F.2d 1250. The opinion of the district court (Pet. App. A52-A64) is not reported.

### JURISDICTION

The judgment of the court of appeals was entered on December 23, 1983. A petition for rehearing was denied on February 8, 1984 (Pet. App. A1). The petition for a writ of certiorari was filed on April 9, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

### STATEMENT

In a 70-count indictment filed in the United States District Court for the Northern District of Ohio, petitioner and five others were charged with conspiracy to violate the Racketeer Influenced and Corrupt Organizations (RICO)

statute, in violation of 18 U.S.C. 1962(d) (count 1); participating in a continuing criminal enterprise, in violation of 21 U.S.C. 848 (count 2); travel in interstate commerce to facilitate an unlawful drug business, in violation of 18 U.S.C. 1952 (counts 3-23); possession of controlled substances with intent to distribute them, in violation of 21 U.S.C. 841(a)(1) (counts 24-39); and use of a telephone to facilitate illegal drug trafficking, in violation of 21 U.S.C. 843 (counts 40-70). Prior to trial petitioner filed a motion to dismiss counts 1 and 2 of the indictment on double jeopardy grounds. Petitioner alleged that his prosecution on the RICO conspiracy count is barred by a prior conviction for RICO conspiracy. He also claimed that the RICO conspiracy alleged in count 1 is a lesser included offense of the continuing criminal enterprise charge alleged in count 2, and that, consequently, the previous RICO conspiracy conviction bars prosecution on count 2 as well as count 1. Following a hearing, the district court denied the motion (Pet. App. A52-A64). On petitioner's interlocutory appeal (see *Abney* v. *United States*, 431 U.S. 651 (1977)), the court of appeals affirmed (Pet. App. A2-A51).

1. The first indictment (CR 81-58) was filed on April 10, 1981, and charged petitioner and his cousin Charles Sinito with RICO conspiracy, the object substantive RICO offense, conspiracy to make extortionate credit transactions, use of extortionate means to collect extensions of credit, and, as to petitioner alone, tax evasion. The enterprise charged in this indictment was the Appliance Mart, an Ohio corporation that allegedly was used as a front for carrying out the predicate acts underlying the RICO conspiracy and substantive charges; the predicate acts all involved violations of the federal loansharking laws, 18 U.S.C. 892 and 894. The indictment identified 12 victims of the loansharking practices and alleged that the criminal conduct had been committed between March 1, 1974, and

January 30, 1979. David Perrier, deceased at the time of the indictment, was named as the sole unindicted conspirator. After a jury trial, petitioner was convicted on the RICO conspiracy and substantive counts, the tax evasion counts, and some of the extortionate credit transaction counts. The court of appeals affirmed without opinion. See *United States* v. *Sinito*, 709 F.2d 1511 (6th Cir. 1983) (table).

The instant indictment (CR 82-119), which was filed on October 27, 1982, names six individuals, including petitioner, Angelo Lonardo,[1] Joseph Gallo, Frederick Graewe, Harmut Graewe, and Kevin McTaggart. Count 1 charges all but Lonardo with RICO conspiracy.[2] The enterprise identified in this indictment is an association in fact known by several names, including "the Cleveland Organized Crime Family," "the Outfit," "the Organization," or "the Mafia." The count charges a conspiracy to use the enterprise to facilitate illegal drug and gambling activities. The predicate acts described in count 1 include murder, illegal gambling activities and obstruction of justice.

Count 2 charges all six defendants (including Lonardo) with participating in a continuing criminal enterprise by acting in a supervisory capacity in the course of engaging in a continuing series of violations of federal drug laws from which they derived substantial income. This count charges, inter alia, that Lonardo was the de facto head of the enterprise; that an unindicted co-conspirator, Carmen Zagoria,

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[1]Lonardo's name was mentioned on several occasions during petitioner's trial on the prior indictment. Gerald Martin testified that petitioner had introduced him to Lonardo, who Martin had heard was an organized crime figure (7/17/81 Tr. 34-35). In addition, Harvey Rieger, who had borrowed money from petitioner that had been delivered by Lonardo, testified that he had been told by Martin that Lonardo was a "rackets figure in Cleveland" (7/21/81 Tr. 46-50).

[2]In the instant indictment, petitioner is accused of killing David Perrier, who was named as an unindicted co-conspirator in the first indictment.

directed its daily operations; and that petitioner and Gallo assisted by financing its operations, protecting it from encroachment, and passing along instructions from Lonardo to other members of the conspiracy. Both the RICO conspiracy and the continuing criminal enterprise are alleged to have begun in March 1978 and to have continued to the date of the indictment.

2. At the hearing on petitioner's motion to dismiss counts 1 and 2 of the instant indictment, the district court heard testimony from three government agents. Agent Herbert Cohrs had worked on the investigation that culminated in the loansharking indictment filed in April 1981. He also participated in the investigation of the second RICO conspiracy. Cohrs stated that the witnesses in the two cases were not the same (H. Tr. 11-15).[3] He acknowledged that he had read reports prepared by other agents indicating the existence of one massive criminal organization of which Lonardo was a member (H. Tr. 23-25). However, Cohrs stated that he learned only within the last year that petitioner also was a member of that organization (H. Tr. 28).[4]

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[3]Cohrs noted that several witnesses referred to Lonardo at petitioner's loansharking trial (see note 1, *supra*) and that the evidence showed that Lonardo provided the funds that petitioner loaned to Harvey Rieger. In addition, Cohrs stated that at that trial the government attempted to introduce into evidence checks executed by Carmen Zagoria, who is named as an unindicted co-conspirator in the instant indictment, and who is to be a principal government witness at the forthcoming trial. According to Cohrs, the government sought to introduce that evidence because Zagoria's name had been mentioned as a loansharking victim (H. Tr. 29-30).

[4]Cohrs testified that prior to the trial in the loansharking case, he came across an FBI report of a statement by government witness Harvey Rieger, who told the FBI that he believed that petitioner was involved in drug activity, particularly cocaine (H. Tr. 36, 39), and that Lonardo had been seen frequently at the Appliance Mart (the enterprise charged in the RICO-loansharking conspiracy) during 1974 (H. Tr

Agent Dean Winslow, who worked on the investigation leading to the instant indictment, testified that he had concluded from his investigation that there was a massive criminal conspiracy by a single organization to control various illegal rackets in Cleveland, including drugs, gambling, and loansharking (H. Tr. 68). He believed that Lonardo and petitioner were active in the loansharking aspect of that conspiracy (H. Tr. 71).[5]

Agent George Grotz, who supervised the Organized Crime Squad in the Cleveland office of the FBI from July 1979 to July 1981, also testified that, based upon FBI reports, he had concluded that there existed one organization in the Cleveland area devoted to controlling a number of illegal activities, including gambling, loansharking and drugs (H. Tr. 91-92). Grotz acknowledged that the investigation showed that the organization had committed other crimes, including murder, obstruction of justice, and bribery (H. Tr. 97-98).

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37-38). Cohrs also stated that he had reviewed an affidavit for a warrant to search the Appliance Mart; the affiant stated that he had received information that two individuals, Daniel Greene and John Nardi, had been murdered because they tried to "muscle in on loansharking and gambling of the organization in Cleveland, Ohio" (H. Tr. 50). Cohrs testified that he had not been involved in the investigation leading up to a 1978 RICO conspiracy indictment, in which eight individuals, including petitioner and Lonardo, had been charged with engaging in loansharking, gambling, murder and other crimes (H. Tr. 21). The predicate acts specified in that indictment, which was eventually dismissed as to petitioner, included conspiracy to murder Nardi and Greene and the actual murder of Greene. Those acts are not set forth in the present indictment.

[5]When asked about the Zagoria checks proffered as evidence in the prior trial (see note 3, *supra*), Winslow stated that they would be offered in evidence at the trial on this indictment because the government had recently learned (as a result of Zagoria's decision to cooperate) that the checks were not drawn to cover a loan from petitioner, but were in payment for methaqualone tablets furnished by petitioner (H. Tr. 82-83).

3. At the conclusion of the hearing, the district court denied the motion to dismiss (Pet. App. A52-A64). Relying on the "totality of circumstances" test of *United States* v. *Jabara*, 644 F.2d 574 (6th Cir. 1981), and *United States* v. *Tercero*, 580 F.2d 312 (8th Cir. 1978), the court examined the extent to which the two conspiracies shared common elements, such as time span, identity of co-conspirators and the nature of the underlying criminal activity. Based on this analysis, the court concluded that the two RICO conspiracies are separate offenses for double jeopardy purposes (Pet. App. A55-A62). The court also held, in reliance on *United States* v. *Phillips*, 664 F.2d 971 (5th Cir. 1981), cert. denied, 457 U.S. 1136 (1982), that the RICO conspiracy charge in the instant indictment is not a lesser included offense of the continuing criminal enterprise charge; it thus rejected petitioner's claim that his prior conviction for RICO conspiracy bars his prosecution for participating in a continuing criminal enterprise (Pet. App. A62-A64).

The court of appeals affirmed (Pet. App. A2-A51). The court upheld the district court's reliance on, and application of, the "totality of circumstances" test (*id.* at A19-A32). Specifically, the court noted that there was only a ten-month overlap in the two conspiracy charges (*id.* at A22); that, with the exception of petitioner, there was no overlap of co-conspirators in the two indictments (*id.* at A23-A28);[6] and that the underlying statutory offenses are different (*id.* at A28-A30).[7]

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[6]The court of appeals rejected petitioner's argument that the references to Lonardo, Zagoria, and Perrier in both cases (see notes 1-3, 5, *supra*) are indicative of the existence of only one conspiracy (Pet. App. A23-A28). The court noted that, unlike other cases in which the personnel overlap was significant, any such overlap here is "minuscule" (*id.* at A27).

[7]The court of appeals noted that the FBI agents' "belief that they were investigating one massive conspiracy is not controlling" (Pet. App. A30).

In addition, the court of appeals held that even if prosecution of petitioner for RICO conspiracy is barred by his prior conviction for that offense, there is no bar to his prosecution for participating in a continuing criminal enterprise (Pet. App. A32-A48). Applying the test of *Blockburger* v. *United States*, 284 U.S. 299 (1932), the court concluded that the two offenses are separate for double jeopardy purposes.

## ARGUMENT

Petitioner's double jeopardy claims, which relate to only two counts of a 70-count indictment, have been carefully examined and rejected by both courts below.[8] The thorough opinion of the court of appeals, on which we largely rely, is correct, does not conflict with the decisions of this Court or any other court of appeals, and does not otherwise warrant review.

1. Petitioner contends (Pet. 25-44) that, under double jeopardy principles, his present prosecution for RICO conspiracy with murder, gambling and obstruction of justice as alleged predicate acts, is barred by his prior conviction for RICO conspiracy involving loansharking activities. In rejecting this contention, the court of appeals recognized (Pet. App. A19) that, under *Braverman* v. *United States*, 317 U.S. 49 (1942), it is the agreement that forms the nucleus of a conspiracy offense. Accordingly, the determination "whether the government can prosecute on more than one conspiracy rests on whether there exists more than one agreement" (Pet. App. A19).

In answering this question, the court of appeals examined the totality of circumstances surrounding each prosecution. Specifically, the court focused on the following five factors: (1) the dates of each conspiracy, (2) the similarity of personnel involved in each offense, (3) differences in the statutory

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[8]We note that more than 19 months have elapsed since petitioner's indictment.

offenses charged in the indictments, (4) the overt acts that would demonstrate the nature and scope of each conspiracy, and (5) the places where each conspiracy was alleged to have occurred. The court's reliance on a "totality of circumstances" approach is consistent with the approach taken by other courts of appeals in this context. See Pet. App. A20 (citing cases). Moreover, the court eschewed a rigid application of the "totality of circumstances" approach. For example, it did not rely on simple comparisons between the allegations in the two indictments; instead, it conducted a broader inquiry into "whether the particular acts alleged in the indictment are part of a larger, unified conspiracy for which the defendant has already been prosecuted" (*id.* at A30).

Applying this approach to the instant case, the court of appeals concluded (Pet. App. A22-A32) that the two conspiracies were distinct in time, participants, and purpose. Although the court noted slight overlaps in time and personnel, it regarded these overlaps as insignificant and not indicative of a single conspiracy (*id.* at A22-A28). Moreover, the court pointed out that each RICO conspiracy involved a different enterprise and distinct overt acts (*id.* at A28-A30). In petitioner's prior prosecution, the enterprise was the Appliance Mart and the overt acts consisted exclusively of loansharking activities; in the instant prosecution, the enterprise is alleged to be a group of individuals associated in fact to commit illegal acts, and the overt acts are murder, gambling, drug trafficking, and obstruction of justice.

We note that petitioner does not advocate a different approach from that employed by the court of appeals. Instead, petitioner simply reviews the same factors considered by the court and quarrels with the manner in which

the court applied those factors to the facts of this case. Further review of this fact-bound claim is not warranted.[9]

2. Petitioner contends (Pet. 50-58) that his prosecution on count 2, for participating in a continuing criminal enterprise (21 U.S.C. 848), is also barred by his prior conviction for RICO conspiracy (18 U.S.C. 1962(d)).

First, as the court of appeals recognized (Pet. App. A32-A33), petitioner's argument can succeed only if his prosecution on count 1, for RICO conspiracy, is barred by double jeopardy. It is clear that if petitioner had not been charged with RICO conspiracy in the present indictment, he would have no colorable double jeopardy claim with respect to the Section 848 offense. The RICO conspiracy involving predicate acts of loansharking for which petitioner was previously convicted is entirely distinct, both in fact and law, from the continuing criminal enterprise involving drug offenses charged in count 2. Petitioner's claim rests on the theory that the earlier RICO conspiracy charge is subsumed

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[9]Although petitioner acknowledges that the courts below placed on the government the burden of establishing that the prosecutions involve separate conspiracies, he finds fault with the court's conclusion that the government successfully met that burden without calling its own witnesses (Pet. 44-50). The court of appeals correctly rejected this contention (Pet. App. A49-A51). There is no reason to require the government to present its own evidence where the evidence adduced by the defense is itself sufficient to warrant denial of the double jeopardy claim. See *United States* v. *Stricklin*, 591 F.2d 1112, 1119 (5th Cir.), cert. denied, 444 U.S. 963 (1979).

Petitioner notes (Pet. 46) that at least one circuit has indicated that it would place the burden on the defendant to show that the offenses are the same. *United States* v. *Martinez*, 562 F.2d 633, 638 (10th Cir. 1977). However, the fact that some other court has adopted a standard of review *less* favorable to petitioner provides no basis for considering whether the court that rejected petitioner's claim erred in its assignment of the burden of proof.

within the RICO conspiracy alleged in count 1 of the instant indictment and that the latter RICO conspiracy is, in turn, subsumed within count 2, the Section 848 offense. Because the courts below correctly concluded that petitioner may be prosecuted on the instant RICO conspiracy charge, his double jeopardy claim with respect to the continuing criminal enterprise charge fails.

In any event, the court of appeals correctly concluded (Pet. App. A34-A48) that each offense requires proof of a fact that the other does not (*Blockburger* v. *United States*, 284 U.S. 299, 304 (1932)) and that, therefore, RICO conspiracy and continuing criminal enterprise are not the "same offense" for double jeopardy purposes. In order to convict petitioner of RICO conspiracy, the government must establish that he associated with an enterprise affecting interstate commerce and that he conspired to participate in the affairs of the enterprise through a pattern of racketeering activity (Pet. App. A38-A42). In order to convict petitioner of a Section 848 offense, the government must show that he engaged in a series of federal felony drug violations that were undertaken in concert with five or more persons with respect to whom he occupied a supervisory or managerial position and from which he obtained substantial income or other resources (Pet. App. A42-A45).

As the court of appeals stated in summarizing the differences between the two offenses (Pet. App. A45-A46):

> RICO encompasses any pattern of racketeering activity proscribed by 18 U.S.C. § 1961. Continuing Criminal Enterprise is limited solely to narcotics trafficking. RICO requires no minimum number of participants. A continuing criminal enterprise has an express requirement that at least five individuals be involved.

> RICO is not addressed to any specific level of organized crime figure. * * * In contrast, the object of the Continuing Criminal Enterprise statute or "Kingpin" statute is specifically aimed at upper level crime figures who occupy a position of control in the narcotics netherworld.
>
> Finally, RICO requires proof of an enterprise, whereas Continuing Criminal Enterprise, using the term in a different context, makes no such requirement of proof. Although defendant argues that the two statutes employ the term "enterprise" in the same context, we do not agree. In a substantive or conspiracy RICO prosecution, the government has the burden of showing the existence of an enterprise that affects interstate commerce. *United States* v. *Phillips*, 664 F.2d 971 (5th Cir. 1981). The enterprise is proven by the existence of a continuing organization and by evidence that members function as a continuing unit. *United States* v. *Phillips supra*, quoting *United States* v. *Turkette*, 452 U.S. 576, 583, 101 S. Ct. 2524, 2528, 69 L. Ed.2d 246 (1981). Moreover, the government must show where the enterprise was furthered through a pattern of racketeering activity. In contrast, § 848 merely requires proof that the defendant undertook a series of violations in concert or in conspiracy with five or more persons. The existence of an enterprise is not a required element. *United States* v. *Phillips*, 664 F.2d at 1013-14. Additionally, there is no requirement that the objective under § 848 be to further the group. The commission of the violations is sufficient.

The decision of the court of appeals on this issue is consistent with the decision of the only other court of appeals that has directly addressed the issue. *United States* v. *Phillips*, 664 F.2d 971, 1010-1014 (5th Cir. 1981), cert.

denied, 457 U.S. 1136 (1982). Accordingly, this issue does not warrant review by this Court.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
*Solicitor General*

STEPHEN S. TROTT
*Assistant Attorney General*

MERVYN HAMBURG
*Attorney*

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